89- 1700

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,

Respondent,

-vs-

UNITED STATES CURRENCY, IN THE AMOUNT OF $228,536.00,

Defendant,

EDWARD A. PARKER,

Claimant-Petitioner.

PETITION OF WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May State Prosecuting Agencies seek to forfeit United States Currency by the State from a person prosecuted for State drug charges, when the State does not have a forfeiture statute, by requesting the Federal Government to institute a forfeiture action under 21 U.S.C. 881 with the understanding that the money will be given back to the State minus costs of bringing the action by the Government?

2. Should Parker have been allowed to call Raymond in support of his Fourth Amendment defense to the Forfeiture Action, or should the doctrine of collateral estoppel apply to the issue of Raymond's availability?

LIST OF PARTIES

The only parties to this action are listed in the caption.

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No.

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— vs —

UNITED STATES CURRENCY, IN THE AMOUNT OF $228,536.00,

Defendant,

EDWARD A. PARKER,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Edward A. Parker petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Federal Circuit which was entered on April 2, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit has not yet been reported. (App. A, infra, A-1 to A-21.) The District Court did not render an opinion. (App. B, infra, B-1 to B-13.)

JURISDICTION

The Court of Appeals entered judgment on February 7, 1990 (App. C, infra, C-1 to C-3.), and denied a petition for rehearing on April 2, 1990. (App. D, infra, D-1.) This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent portion of 21 U.S.C. §881 provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter...

21 U.S.C. §881(e)(3)(B) Disposition of Forfeited Property

(3) The Attorney General shall assure that any property transferred to a State or Local law enforcement agency under paragraph (1)(A)-
(B) is not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies.

STATEMENT

On December 29, 1986, the Oneida County District Attorney's Office made application with the Department of Justice for transfer of Federally Forfeited Property in regards to $228,536 in United States Currency seized from Edward A.

Parker. On January 13, 1987 the New York State Police, Troop D made out application for the transfer of the seized currency. On January 13, 1987, the Utica Police Department also made application for the currency. The currency was obtained as a result of a New York State Police investigation that culminated in a raid on August 30, 1983 of Parker's residence. The currency was held in a safety deposit box at the Oneida City Savings Bank. The requests by the state agencies were made while the currency was in the possession of the state agencies.

On June 7, 1987, acting on the request of the three state agencies, a Federal warrant was issued for the seizure of the $228,536.00 in United States Currency that was in the safety deposit box at the Oneida City Savings Bank. The State prosecution of Parker was completed on June 6, 1986, with Judge Richard Simons from the New York State Court of Appeals denying leave to appeal to the Court of Appeals for the State of New York. On June 24, 1987, Parker was served with a complaint under 21 U.S.C. 881 by the Government seeking to forfeit the currency. On August 10, 1987, Parker filed an Answer and put a claim in for the currency. A trail was held in March, 1989, on the Forfeiture Proceeding and the decision and judgment by Judge Thomas J. McAvoy granted forfeiture.

Parker was prosecuted in State Court as a result of the arrest for Criminal Possession of a Controlled Substance in the First Degree in Indictment No. 83-296 and Conspiracy in the Second Degree in Indictment No. 83-311 with several co-defendants. In February of 1984 a Suppression Hearing was held on the issuance of the eavesdropping warrants issued from June 14, 1983 with extensions to August 30, 1983. The Court denied the motions and in October of 1984 Parker entered into a plea bargain whereby Indictment 83-311 would be dismissed in full satisfaction of a plea to Indictment 83-296 with a promise that Parker would receive no more than twenty years to life imprisonment. No mention was ever made by the prosecution of bringing a forfeiture proceeding against the $228,536.00 in United States Currency found on the Parker property at the time of his arrest during the plea negotiations. On December 18, 1984, Parker was sentenced to 20 years to life on Indictment 296 and Indictment

311 was dismissed. The Appellate Division affirmed the legality of the issuance of the eavesdropping warrant in *People v. Baris* 116 AD2d 174 (Fourth Dept. 1986). Leave to appeal to the Court of Appeals was denied (Simons, J.) on June 6, 1986.

The background of the investigation into Parker began in January of 1983. This investigation, initially headed by New York State Police Investigator Lee Pavlot, was based upon the unsubstantiated tip from a confidential informant named Joseph Santillo that Santillo had witnessed a drug sale a year earlier in 1982. Santillo claimed that he could introduce the police to persons who purchased from Parker for the purpose of attempting infiltration into an alleged drug sale network involving Parker. Santillo's cooperation was the product of a deal negotiated by him with the authorities to secure his freedom from a series of arrests on charges of multiple drug sales, burglary and for giving false statements under oath.

As a result of Santillo's claims, Pavlot undertook an aerial surveillance of the Parker residence in Remsen, New York. The purpose of the February 1983 surveillance was to verify if indeed there was a residence located where Santillo claimed one existed. Pavlot took aerial photographs during this February 1983 flight. These photos were not provided defense counsel at the time of the Suppression Hearing.

In April of 1983, Santillo went undercover with one Trooper D'Elia for the purpose of purchasing amounts of cocaine from individuals identified by Santillo as cocaine dealers. Unsuccessful attempts at buys were made by Santillo from one Daniel Creaco. Purchases of small amounts were made by Santillo from one Priore, one Scharf and one Walter F. Raymond, Jr. After the original purchase from Raymond, D'Elia and Santillo made larger buys from Raymond on April 26, May 3, and May 17, 1983.

Throughout the period of time that D'Elia and Santillo dealt with him Raymond represented the following:

a) Raymond was acquainted with Parker;

b) Raymond purchased large quantities of cocaine from Parker on a regular basis;
c) Raymond was familiar with the fact that Parker had a horse barn because his brother-in-law worked on it.

On May 12, 1983, Investigator Michael J. Navin took over the investigation from Pavlot. Although we now know that Raymond lied about Parker to the police from the very beginning, even the police recognized the need to verify these rumors about Parker. Their unsuccessful attempts included the following:

a) Placement of a pen register on Parker's phone on May 18, 1983, the failed purpose of which was to connect Parker with Raymond;
b) Surveillance of Raymond on May 12, 1983 when Raymond claimed he was going to Parker's residence;
c) Arranging a May 17, 1983 purchase from Raymond of one ounce of cocaine. Raymond was to make a phone call from Parker's residence of D'Elia at a rural bar approximately 10 miles from Parker's residence between six and seven o'clock p.m. to assure he had possession of the ounce of cocaine, for sale to D'Elia at the bar. To obtain verification of the relationship claimed between Raymond and Parker, the police both staked out and arranged surveillance of the Parker residence to coincide with Raymond's call which, as stated, was supposed to come from Parker's residence. Raymond did call D'Elia at the bar claiming to call from Parker's residence at 6:50 p.m. However, the stakeout never observed Raymond go to Parker's residence. In fact, after the sale by Raymond to D'Elia at the bar, police followed Raymond back to Utica and not to Parker's residence as Raymond claimed he would do. As a result of all this, not only was verification missing, but suspicions about Raymond's truthfulness were greatly magnified.

Navin claimed he flew over the Parker residence on May 19, 1983 because of his suspicions and concerns of not verifying the fact that Raymond was calling from Parker's on the night of

May 17, 1983. Navin claimed that this flight revealed that a road on which the Parker residence was located was not a deadend as Navin believed, based upon information from Pavlot, thus rendering, in Navin's opinion, equivocal the failed surveillance of May 17, 1983. Thereafter, on June 14, 1983, Navin applied to Oneida County Judge Darrigrand for an eavesdropping warrant. The application was based upon the affidvaits of Navin and D'Elia.

In this affidavit, Navin failed to point out and, in fact, concealed the following:

a) That the initial information from Santillo leading to the investigation was totally stale, having been based upon claimed events more than one year prior and this information could not be verified;
b) Raymond, their current source, had lied to them on numerous occasions;
c) All attempts at verifying Raymond's claims and acts had failed.

In fact, Navin's affidavit was untruthful as to the failed May 17, 1983 surveillance claiming that it had to be "terminated" rather than admitting its failure. Also Navin failed to disclose that the state of the investigation was no farther along or better in June 1983 than it had been in January 1983 when all they had was Santillo's unreliably stale information given by Santillo in exchange for his freedom.

The eavesdropping warrant was extended twice by Judge Darrigrand in July and August 1983 based upon Navin's interpretation of vague and ambiguous conversations. Navin continued to represent to Judge Darrigrand as fact that Raymond was dealing drugs with Parker not only during this period of inability to verify Raymond's claim, but even after Navin discovered in the first week of August 1983 that Raymond was, in fact, lying. On August 22, 1983, Navin obtained a search warrant from Judge Darrigrand, while continuing his scheme to misrepresent to and conceal facts from the Court in order to obtain the warrant.

In February 1984, a Suppression Hearing on the eavesdropping warrant was held before Robert G. Hurlbutt, Acting Oneida County Judge. Although Judge Hurlbutt found that Navin had made false statements in disregard for the truth, the Judge also found, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) that they were not material to the findings of probable cause, and were negligent, not reckless. In addition, the Judge ruled that probable cause to issue the eavesdropping warrant was established.

In December 1984, Parker moved to reopen the February 1984 hearing on the *Franks* and probable cause issues due to newly discovered material information. The new information was as follows:

a) Discovery of Pavlot's January 1983 aerial photos known to Navin showing that *Navin had prior knowledge* that Parker's residence was not on a dead-end road prior to the May 17, 1983 surveillance for which he used a claim of lack of knowledge as an excuse for the failure of the surveillance. In fact, Navin had surveillance in place to verify Raymond's claims.
b) Navin was untruthful in his affidavit about the availability of drug money for buys.
c) Navin was untruthful in his affidavit about the identity of certain individuals.
d) navin was untruthful about the interpretation of certain phone conversations pursuant to the eavesdropping warrant used to obtain the search warrant.

By reason of the denial of a hearing and suppression, Parker was not afforded the opportunity to cross-examine Navin and other witnesses to whom the insufficiency of the telephone conversation as probable cause and the unconstitutional taint of the *Frank's* violations in all the prior applications.

In August 1987, Parker filed an Answer and claim to the $228,536.00 in United States Currency that is the subject-matter of the Forfeiture Proceeding. Parker asserted as a defense that

the Fourth Amendment was violated in the obtaining of the "res". In September of 1987, Parker sought to take the deposition of Walter F. Raymond, Jr., to discover evidence in support of his Fourth Amendment claim. The Government moved to preclude the taking of Raymond's deposition and to strike Parker's Fourth Amendment defense upon the grounds of collateral estoppel in that Parker had a full and fair opportunity to litigate his Fourth Amendment claim in the State Court criminal proceeding. Parker claimed that since Raymond as under indictment in 1984 for selling drugs and Raymond and his lawyer advised Parker's lawyers that he would plead the Fifth Amendment if called to testify that Raymond was unavailable. Parker further contends that since Raymond had already plead guilty and served his sentence by the fall of 1987 that he was now available and could not plead the Fifth Amendment. The Court ruled that Parker could and should have called Raymond to the stand at the Suppression Hearing in State Court and have Raymond plead the Fifth Amendment on the stand before he could be classified as unavailable.

Prior to the trial of the Forfeiture case Parker moved to dismiss the action upon the grounds that the entire Forfeiture Proceeding should be barred as a violation of Due Process under the Fifth Amendment. Parker contends that when he plead guilty in State Court pursuant to a plea agreement he was never advised that a Forfeiture Proceeding would be brought three years later by the same State prosecuting agency that he was plea bargaining with. It is further contended that no Federal Agency was involved in the state seizure or state prosecution. The Federal Government was requested to bring the Forfeiture action by the state prosecuting agencies with the purpose being that the currency go directly to the state prosecuting agencies. The United States Attorney's Office thus is an agent of the State prosecuting agencies and becomes bound by the jurisdictional limitations of the plea bargain just as much as the State is bound by the plea bargain. This means that if the State couldn't forfeit the property the Federal Government couldn't either when acting solely as an agent of the State. The Federal Government's bringing of a forfeiture action solely as an agent of the State violates principles of Due Process and fundamental fairness under the Fifth Amendment in the instant case.

REASONS FOR GRANTING THE PETITION

I

THE FORFEITURE ACTION WAS JURISDICTIONALLY DEFECTIVE BECAUSE A STATE SHOULD NOT BE ALLOWED TO PROSECUTE SOMEONE UNDER ITS LAW AND THEN ASK THE FEDERAL GOVERNMENT TO COME AND FORFEIT PROPERTY IN THE POSSESSION OF THE STATE, WHEN THE STATE HAS NO FORFEITURE STATUTE, WITH THE PURPOSE OF THE FORFEITURE SOLELY BEING FOR THE RETURN OF THE CURRENCY TO THE STATE PROSECUTING AGENCIES WITH THE GOVERNMENT RECEIVING REIMBURSEMENT FOR THE LIGITATION OF THE FORFEITURE ACTION.

This case raises the important general constitutional issue of whether a State can forfeit property as a result of a State criminal prosecution when the State has no forfeiture statute by enlisting the Federal Government as its agent to use its forfeiture statute 21 U.S.C. 881 to forfeit the property and then return it to the State. The effect of this type of procedure gives State prosecutors powers that the State legislatures have not provided by statute. It should be stressed that this is not a situation where the Federal Government seized the currency on its own or even had the currency in its possession. It was six months after the State agencies filled out forms requesting the transfer of Federally Forfeited Property that the Federal Government even obtained the currency. The State agencies were requesting transfer of the property that hadn't even been in the possession of the Federal Government, seized or forfeited by the Federal Government.

The type of procedure used in the instant case is not an adoptive forfeiture as that term has been defined by this Court in *United States v. One Ford Coupe Automobile* 272 U.S. 321, 71 L.ED. 279 (1926) or *Dodge v. United States* 272 U.S. 530, 71 L.ED. 392 (1926). The adoptive forfeiture cases hold that the

Government has the power to adopt and seize property that has originally been seized by a state government if the Federal Government decides to seize the same property. In the instant case the Federal Government did not choose to initiate a forfeiture of the currency. The Federal Government was asked by the State prosecuting agencies to bring a forfeiture action and give the currency to the state government because the State did not have the legislation to accomplish the forfeiture within its own judicial framework. The State is circumventing its own laws prohibiting forfeiture (because no New York State statute existed allowing forfeiture) by using the Federal Government's jurisdiction. It should be noted that 21 U.S.C. §881(e)(3)(B) was amended effective September 30, 1989, to read that any property transferred to a State or local agency under paragraph (1)(A) is not so transferred to circumvent any requirement of State Law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies.

The forfeiture in the instant case was the result of a criminal prosecution in State Court and was more in character with an *in personam* forfeiture even though said forfeiture was accomplished through the civil *in rem* frofeiture under 881. It is submitted that this Court has stated that in construing forfeiture proceedings as to whether it is criminal or civil that certain considerations be made. *Kennedy v. Mendoza-Martinez* 372 U.S. 144, 9 L.ED. 2d 644 (1963); *United States v. Ward* 448 US. 242,65 L.ED. 2d 742 (1980).

This case presents an opportunity for this Court to decide whether it is constitutionally permissible for the Department of Justice and FBI to utilize the fruits of local investigations and convictions against defendants for purposes consistent with criminal penalties as opposed to civil remedies. See *Hearing Before the Subcommittee on Crime of the Committee on the Judiciary House of Representatives* March 9, 1987, Statement of Bill Wells, Special Agent of FBI, Southern District of Florida. Although the statute used to accomplish the forfeiture in the instant case has long been held to be civil in nature and remedial (See *United States v. One Assortment of 89 Firearms* 465 U.S. 354, 79 L.ED. 2d 36 [1984]) it is being used to ac-

complish an otherwise impermissible State forfeiture that is the result of a criminal prosecution and thus, criminal in nature and *in personam*. In *United States v. Ward*, supra, this Court stated that the *Mendoza-Martinez* considerations provided some guidance in deciding whether the statute in *Ward* was criminal or civil. In the instant case it is the fact that the Federal *in rem* statute is being used to effect a State *in personam* forfeiture that should be the focus instead of merely looking just to the statute that the proceeding was brought under.

This Court has recognized that forfeiture statutes involve certain aspects of due process application as a result of their linkage to the criminal law. *Boyd v. United States* 116 U.S. 616, 29 L.E.D. 221 (1886). *One 1958 Plymouth Sedan v. Pennsylvania* 380 U.S.693, 14 L. ED. 2d 170 (1965). Historically, *in rem* forfeitures were so far removed from criminal prosecutions that they weren't even brought in the same court. See *Bane of American Forfeiture Law-Banished at Last?* 62 Cornell L. Rev. 768. Therefore there has been a distinguishing line between *in rem* forfeitures and criminal proceedings in terms of what due process safeguards are to be afforded claimants in forfeiture actions as opposed to defendants in criminal actions. With the advent of *in personam* criminal forfeiture statutes that have developed over the last ten years (see 18 U.S.C. 1961 et seq. and 21 U.S.C. 848) the line distinguishing civil *in rem* forfeitures and criminal *in personam* forfeitures is not that clear. If the forfeitures can be labelled *in personam* then due process mandates that the claimant-defendant be afforded the same protection as a criminal defendant because forfeiture is a direct consequence of the criminal prosecution according to the rationale of the RICO and CCE statutes cited above.

In the case at bar the Petitioner Parker contends that the State had an affirmative duty to advise him that it intended to seek forfeiture of the money it seized when it arrested him by way of forfeiting the money after obtaining a conviction. Parker had no knowledge that the State could have sought forfeiture at the time of his plea because New York had no forfeiture statute. *Boykin v. Alabama* 395 U.S. 238, 23 L.ED. 2d 274 (1969) demands rationality in the plea bargain with the

record showing that the plea was entered knowingly with an understanding of its ramifications. One of the ramifications and a direct consequence of the plea was the institution by State prosecuting authorities of the instant forfeiture proceeding. To allow this type of practice to continue encourages prosecutorial sandbagging in the plea bargaining process.

The Circuit Court's opinion misstakes the issue. The Circuit Court acknowledges that the forfeiture action was brought by the Federal Government at the behest of the State but never addresses the issue of whether or not that transforms the proceeding into a State *in personam* forfeiture. It is also interesting to note that the Court states in footnote[1] that "if law enforcement efforts to combat *racketeering* and drug trafficking are to be successful, they must include an attack on the economic aspect of these crimes." The Circuit Court's quote is the Congressional reasoning for *in personam* forfeiture involving criminal offenses under RICO and CCE. The Circuit Court therefore is using *in personam* forfeiture reasoning to explain the *in rem* forfeiture of the instant case. The Court never addressed the issue of whether the institution of the forfeiture proceeding by State prosecutors nullified the *in rem* nature of the proceeding. It is submitted that this forfeiture action was a State *in personam* forfeiture based on Parker's criminal conviction and that due process demands that fairness in the plea bargaining process requires the defendant to be made aware prior to deciding whether to plead or not whether a direct consequence of his plea can be the State forfeiting his property. A plea bargain stands on different ground than an acquittal because it is a contractual agreement between the prosecution and the defendant thus requiring full disclosure on the part of the prosecution of its intention to seek forfeiture of assets. This would have to be disclosed in a plea bargain dealing with forfeitures under RICO and CCE. There is no reason why due process should demand anything less in the present case.

I

THE CLAIMANT PARKER'S FOURTH AMENDMENT DEFENSE SHOULD NOT HAVE BEEN STRUCK AND

PARKER SHOULD HAVE BEEN ALLOWED TO TAKE THE DEPOSITION OF WALTER F. RAYMOND, JR. TO ESTABLISH HIS AFFIRMATIVE DEFENSE OF THE PROPERTY BEING TAKEN IN VIOLATION OF THE FOURTH AMENDMENT AND PRINCIPLES OF COLLATERAL ESTOPPEL SHOULD NOT APPLY BECAUSE PARKER WAS DEPRIVED OF RAYMOND'S CRUCIAL EVIDENCE AT THE STATE COURT SUPPRESSION HEARING THROUGH NO FAULT OF HIS OWN.

The Circuit Court held "that had Raymond been legally unavailable to testify at the State Court proceedings and his testimony would have undermined the State Court's findings of probable cause, collateral estoppel would not apply (App. A-20)." The Circuit Court then cited this Court's decision in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.* 402 U.S. 313, 28 L.E D.2d 788 (1971) and concluded that Parker was responsible for Raymond's failure to testify in the State Court proceedings and Raymond's testimony was not "crucial" to Parker's Fourth Amendment defense. The Circuit Court concluded that since Parker never actually called Raymond to the stand that it was Parker's fault for Raymond not testifying at the State Court proceedings because there was no indication on the record that Parker believed Raymond's testimony was necessary. In opposition to the motion to strike Parker's Fourth Amendment defense an affidavit was submitted by Raymond's lawyer Antonio Faga stating that Raymond was not available to testify for Parker at the State Court Suppression Hearing because he intended to plead the Fifth Amendment if called to testify. It is submitted that the record developed during the Forfeiture litigation established Raymond's unavailability at the State Court Suppression Hearing through no fault of Parker. Since Raymond had plead guilty and completed his sentence by the time Parker subpoenaed Raymond for his deposition Raymond was now available and could not plead the Fifth Amendment.

The Circuit Court also concluded that the Appellate Division and the trial Court did not consider the evidence supplied by Raymond to be material to the existence of probable cause.

Raymond's testimony as to the truthfulness of that information was not "crucial" or even relevant according to the Circuit Court. (App. A-21). The Circuit Court is factually incorrect in this regard as well as legally incorrect. The decision of the Appellate Division (*People v. Baris*) 116 AD2d 174 Fourth Dept.) found Raymond's information could be deleted per *Franks v. Delaware* 438 U.S. 154 (1978) in analyzing the issuance of the search warrants involved (*People v. Baris* 116 AD 190). However, Raymond's information was crucial and essential in finding probable cause for the initial eavesdropping warrant issued on June 4, 1983. See 116 AD 184. It is submitted that if the initial eavesdropping warrant is lacking in probable cause then all the subsequent extensions and resultant search warrants are tainted from the initial illegality. It is the issue of probable cause for the eavesdropping warrant that Raymond could provide crucial and essential evidence showing how the police officer gave false material facts in their warrant applications and showed reckless disregard for the truth. The lower courts improperly struck Parker's Fourth Amendment defense by improperly ruling he was collaterally estopped from taking Raymond's deposition.

Dated: April 1990

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BY: 

FRANK POLICELLI, ESQ.
Counsel of Record

KENNETH P. RAY, ESQ.
Co-Counsel

APPENDIX

APPENDICES

A-1

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 279—August Term 1989
(Argued October 20, 1989 Decided February 7, 1990)
Docket No. 89-6110

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— *v.* —

UNITED STATES CURRENCY IN THE AMOUNT OF $228,536.00,

Defendant-Appellant,

EDWARD A. PARKER,

Claimant-Appellant.

BEFORE:
MESKILL AND WINTER, *CIRCUIT JUDGES,*
AND LASKER, *DISTRICT JUDGE.**

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* Hon. Morris E. Lasker, Senior District Court Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appeal by claimant Edward Parker from a decision of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Judge*), ordering forfeiture of defendant currency.

Affirmed.

FREDERICK J. SCULLIN, JR., United States Attorney for the Northern District of New York (John G. Duncan, Esq., Assistant United States Attorney on the brief) for *Plaintiff-Appellee,*

FRANK POLICELLI, ESQ., Utica, New York (Kenneth P. Ray, Esq., Utica, New York on the brief) for *Claimant-Appellant.*

LASKER, *District Judge:*

This appeal presents the novel question whether the Due Process clause of the Fifth Amendment requires a court, before accepting a plea of guilty to a crime, to inform the defendant that the government might at some later time institute a civil *in rem* forfeiture proceeding against the fruits or instrumentalities of that crime.[1]

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[1] "The term 'forfeiture' is best defined as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign." *United States v. Eight (8) Rhodesian Stone Statues,* 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

Congress has declared that "if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374.

Edward Parker appeals from a judgment entered in the United States District Court for the Northern District of New York (McAvoy, D.J.) ordering forfeiture of money seized from his property during a state drug investigation. We hold that because the forfeiture was not a direct consequence of his criminal conviction the court had no duty to alert Parker to the possibility of forfeiture before accepting his plea. Moreover, we agree with the district court's holding that Parker was collaterally estopped from interposing a Fourth Amendment defense to the forfeiture because his Fourth Amendment claim was fully and fairly litigated in the state court criminal proceedings. Accordingly, the judgment of forfeiture entered by the district court is affirmed.

BACKGROUND

A. *The Investigation*

In January of 1983 a confidential informant told the New York State Police Department (the "Police") that Parker was dealing large quantities of cocaine and that the informant, who had seen Parker sell drugs, could help the Police infiltrate a drug network by introducing them to Parker's customers.

The informant introduced the Police to Walter Raymond, who told them that he purchased large quantities of cocaine from Parker on a regular basis. In April and May of 1983, an undercover officer and the confidential informant bought drugs from Raymond on several occasions. The Police made unsuccessful attempts to verify Raymond's claim that he purchased from Parker. A pen register on Parker's phone revealed no telephone calls between Parker's residence and Raymond, and surveillance teams failed to substantiate Raymond's claims that he obtained drugs from Parker at Parker's home.

The Police sought and received a thirty-day eavesdropping warrant from an Oneida County judge on June 4, 1983 authorizing a tap on Parker's phone based on affidavits from the officer in charge of the investigation and the undercover officer who purchased drugs from Raymond. The affidavits recited the allegations of the confidential informant and Raymond that

Parker sold large quantities of cocaine from his house. They also contained information obtained from a pen register indicating that Parker's phone had been used to place calls to phones of individuals identified by the FBI as suspected drug dealers.

The wiretap yielded tape recordings of numerous conversations implicating Parker in drug trafficking. At the same time, evidence was developed suggesting that Raymond may not have been dealing directly with Parker. The warrant was extended twice and amended to add the names of other individuals and to delete Raymond's name as an informant because the Police had been unable to verify his information. Following the last extension of the warrant, the Police intercepted a number of conversations relating to cocaine trafficking and they learned that cocaine was buried on Parker's property.

Based on the intercepted conversations, on August 22, 1983 an Oneida County judge issued a search warrant for Parker's residence. On August 27, 1983, the wiretap revealed that Parker had recently received a shipment of cocaine. Three days later, the Police searched Parker's residence and seized eleven kilograms of cocaine and $228,536 in cash.

B. *The State Proceedings*

Parker was indicted by a New York state grand jury on September 29, 1983 on charges of Criminal Possession of a Controlled Substance in the First Degree and Conspiracy in the Second Degree. He moved to suppress the evidence obtained in the search, including the cocaine and the currency, on the ground that the eavesdropping warrants and search warrants were not based upon probable cause. Parker asserted that the affidavits in support of the eavesdropping warrants failed to alert the judge that the initial information from the confidential informant which prompted the investigation was stale and could not be verified; that Raymond had lied on numerous occasions; and that all attempts at verifying Raymond's claims about drug deals with Parker had failed.

A suppression hearing was held before an Oneida County judge in February of 1984 to determine whether probable cause

had existed to issue the eavesdropping warrants and whether the police made materially false or reckless representations in their affidavits. The judge concluded that although the Police made false statements in the warrant applications, the statements were negligent, not reckless, and were not material to a finding of probable cause. The judge held that probable cause to issue the eavesdropping warrants had been established and that the warrants had been issued in conformity with New York Criminal Procedure Law.

In December of 1984, Parker moved to reopen the February 1984 suppression hearing on several grounds. First, he claimed that "newly discovered" aerial photos taken by the Police in January of 1983 proved that the Police had reason to doubt Raymond's veracity when they asked the judge to rely on information from Raymond to establish probable cause.[2] He also claimed to have new information indicating that the Police were untruthful in their affidavits about the availability of money for drug buys, the identity of certain individuals and the interpretation of certain phone conversations overheard pursuant to the eavesdropping warrant and used to obtain the search warrant. The judge denied Parker's motion to reopen.

On December 18, 1984, Parker pled guilty to Criminal Possession of a Controlled Substance in the First Degree. The con-

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[2]On May 17, 1983, an undercover officer arranged to purchase an ounce of cocaine from Raymond. Raymond said that he would telephone the officer from Parker's residence to assure that he had the cocaine. In order to verify the relationship between Raymond and Parker, the Police arranged a stakeout of Parker's residence to coincide with Raymond's call. Raymond called the officer, claiming to be at Parker's residence. However, the stakeout team never observed Raymond go to Parker's residence. Two days later, the Police undertook aerial surveillance of Parker's residence and learned, they claimed for the first time, that there was more than one possible approach. Therefore, the Police came to the conclusion that the stakeout team might have missed Raymond's visit and therefore Raymond might not be lying. Parker claimed that the "newly discovered" photos taken in January of 1983 prove that the Police must have known that there was more than one approach to Parker's residence at the time of the failed surveillance. Parker concludes that they therefore must have known that Raymond was lying about visiting Parker.

spiracy count was dismissed and Parker received a sentence of twenty years to life. The disposition of the money seized from Parker's property pursuant to the search warrant was not discussed.

Parker appealed the denial of his motion to suppress. The Appellate Division affirmed, holding that although the Police included statements in the warrant application that demonstrated "a reckless disregard for the truth," the false statements were not material to a finding of probable cause. *People v. Baris*, 116 A.D.2d 174, 185, 500 N.Y.S.2d 572, 581 (1986). Leave to appeal to the New York Court of Appeals was denied on May 21, 1986. *People v. Parker*, 67 N.Y.2d 1055, 495 N.E.2d 364, 504 N.Y.S.2d 1031 (1986).

C. *The Forfeiture Proceedings*

On December 29, 1986 and January 13, 1987, the Oneida County District Attorney's Office, Troop D of the New York State Police and the Utica Police Department submitted to the U.S. Department of Justice Applications for Transfer of Federally Forfeited Property asking the federal government to seize the $228,536 found on Edward Parker's property.[3] On June 7, 1987, a federal warrant was issued for seizure of the $228,536, which at the time was stored in a safety deposit box at the Oneida City Savings Bank. On June 24, 1987, the federal government served Parker with a civil, *in rem* complaint against

[3]When the currency was seized from Parker's residence in August of 1983, New York state had not yet passed a statute allowing for the forfeiture of drug money. However, 21 U.S.C. § 881(e)(1)(A) (1988) authorizes the Attorney General to "transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property."

the currency seeking forfeiture under 21 U.S.C. § 881.[4] On August 10, 1987, Parker filed an answer and a claim to the property in which he asserted as an affirmative defense that the currency was obtained in violation of the Fourth Amendment.

In September of 1987, Parker sought to depose Raymond. The government moved to preclude the deposition and to strike Parker's Fourth Amendment defense on collateral estoppel grounds, claiming that Parker had had a full and fair opportunity to litigate his Fourth Amendment claim in the state court criminal proceeding. Parker replied that he was denied a full and fair hearing arguing, among other things, that Raymond had been unavailable at the time of the state court probable cause hearing but had subsequently become available.[5] Judge McAvoy granted the government's motion to strike Parker's Fourth Amendment defense on collateral estoppel grounds and ruled that because Parker's Fourth Amendment claim was stricken, Raymond's testimony would be irrelevant. Before the trial of the federal forfeiture case, Parker also moved to dismiss the government's complaint on Fifth Amendment Due Process grounds, claiming that at the time of his guilty plea in state court he was never advised that forfeiture proceedings might be brought against the money. Parker claims that since the forfeiture was requested by state agencies, the U.S. Attorney's Office was an agent of the state and therefore bound by the plea agreement. Parker's motion to dismiss was denied.

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[4]21 U.S.C. § 881(a) (1988) provides in relevant part:

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . .(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . ."

[5]At the time of the suppression hearing, Raymond and his lawyers had advised Parker's lawyers that Raymond would invoke his Fifth Amendment right if called to testify because Raymond was under indictment at that time as a codefendant of Parker. By the time of the forfeiture proceeding, Raymond had pled guilty and served his sentence.

A bench trial on the forfeiture claim was held on March 27-29, 1989. The government's proof that the money was drug-related included tapes and eyewitnesses testimony from a roommate and business associate of Parker detailing Parker's possession, processing and sales of multi-kilo amounts of cocaine, testimony from an F.B.I. analyst describing drug records belonging to Parker which detailed hundreds of thousands of dollars of cocaine transactions, and Parker's federal tax records which reflected $19,000 gross income in the two preceding years. Parker testified that the money represented the proceeds of two inheritances plus profits from a restaurant he owned. He offered no financial records to substantiate these claims. The court granted a judgment of forfeiture from which Parker now appeals.

DISCUSSION

On appeal, Parker maintains that his plea agreement bars the government from forfeiting the currency. He also asserts that the District Court erred in rejecting his Fourth Amendment defense and in issuing a protective order preventing him from deposing Raymond. For the reasons that follow, we reject these contentions and affirm the judgment of the district court.

A. *Due Process*

Parker asserts that the Due Process clause of the Fifth Amendment bars the federal government from bringing a forfeiture proceeding against him because 1) during the negotiations leading up to his guilty plea, the district attorney never told him that the state agencies that prosecuted him intended to seek forfeiture and the judge who accepted the guilty plea never advised him of the possibility of forfeiture, 2) there was an unreasonable delay between the entry of his guilty plea and the commencement of forfeiture proceedings nearly three years later, and 3) the currency seized from his residence was impermissibly "destroyed" when it was converted into a check.

1. *The Plea Agreement*

Parker argues in effect that the state's failure to advise him at the time of his plea that it would attempt to forfeit the money operates as a promise that such an action would not be brought. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). The remedy for a breached plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement. *United States v. Brody*, 808 F.2d 944, 947 (2d Cir. 1986). Parker does not seek to withdraw his guilty plea, but rather requests specific performance by an order barring the forfeiture.

There are two reasons why Parker is not entitled to such relief. First, under New York law, off-the-record promises made by the government in exchange for a guilty plea are not enforceable. *Siegel v. New York*, 691 F.2d 620, 626-27 (2d Cir. 1982) (neither New York law nor federal due process requires prosecutor to fulfill off-the-record promise made in plea bargaining negotiations), *cert. denied*, 459 U.S. 1209 (1983); *People v. Hood*, 62 N.Y.2d 863, 865, 477 N.Y.S.2d 621, 622, 466 N.E.2d 161, 162 (1984) (defendants not entitled to specific performance of alleged plea bargain which was never formally entered on the record); *District Attorney of Kings County v. Roman*, 141 A.D.2d 601, 529 N.Y.S.2d 522 (1988) (promises in connection with guilty plea which are not placed on the record are not enforceable). Therefore, even if such a promise had been made, Parker's failure to put it on the record during his plea allocution renders it unenforceable. Second, the judge who accepted Parker's guilty plea specifically questioned both Parker's attorney and the assistant district attorney as follows: "[H]ave there been any other conditions, understandings, agreements attached to the plea other than what has been stated right here and now on the record?" Both responded that there were no other agreements. Appendix for Appellant ("A.") at 182. The judge further inquired, "I want to ask you, Mr. Parker, whether your attorney, the District Attorney, myself or

anyone else has made any other promises to you other than what has been stated right here and now to cause you to plead guilty, here, today?" Parker responded, "No, your honor." A. at 186.

Parker does not allege that any explicit promise was made about forfeiture but rather that the judge and the district attorney had an affirmative duty to inform him that he might face the additional penalty of forfeiture.[6] However, since the forfeiture was not a necessary consequence of Parker's guilty plea, there was no requirement that Parker be informed that it might someday occur. *Roman*, 141 A.D.2d at 601, 529 N.Y.S.2d at 522; *People v. Mitchell*, 121 A.D.2d 403, 502 N.Y.S.2d 805 (1986).

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[6]Parker cites *Himelein v. Frank*, 141 Misc. 2d 416, 532 N.Y.S.2d 977 (1988), *rev'd on other grounds*, _____ A.D.2d _____, 547 N.Y.S.2d 775 (1989), in which the New York state trial court held that where certain criminal charges against a defendant were dropped as a result of a plea agreement, the district attorney was precluded from bringing a civil forfeiture proceeding against the defendant based on the charges that were dropped.

The *Himelein* case is inapposite. The forfeiture proceeding of which Parker complains was an *in rem* proceeding brought against the currency rather than Parker himself. The forfeiture statute employed in *Himelein* is an *in personam* statute which provides for forfeiture through a civil proceeding against a guilty person rather than against property. While Article 13A of the New York Civil Practice Law and Rules permits forfeiture proceedings only against individuals guilty of criminal conduct, the federal forfeiture statute under which Parker's money was seized provides for forfeiture of property used in drug trafficking without regard to the guilt or innocence of its owner. Further, unlike the forfeiture in the *Himelein* case which required the government to prove the same conduct involved the charges that were dropped against the defendant in exchange for his guilty plea, the forfeiture of Parker's money was based on conduct clearly encompassed in the charge to which he pled guilty.

Parker also cites *United States v. Khan*, 857 F.2d 85 (2d Cir. 1988), *reh'g granted*, 869 F.2d 661 (2d Cir. 1989), in which this court held that Rule 11 of the Federal Rules of Criminal Procedure required that a defendant's conviction be vacated because the district court failed to inform him prior to accepting his plea that the maximum sentence could include restitution. However, *Khan* does not establish that Rule 11 requires anything more than that the judge inform the defendant of the maximum possible penalty for the particular criminal offense for which the judge is sentencing the defendant. Further, the precise terms of Rule 11 are not applicable to state courts. *Roddy v. Black*, 516 F.2d 1380, 1383 (6th Cir.), *cert. denied*, 423 U.S. 917 (1975).

Certain possible consequences of a guilty plea are "collateral" rather than direct and need not be explained to the defendant in order to ensure that the plea is voluntary. *United States v. Russell,* 686 F.2d 35, 38 (2d Cir. 1982). For example, judges are not required to inform a defendant of the possibility of deportation after a guilty plea. *Michel v. United States,* 507 F.2d 461, 465-66 (2d Cir. 1974); *United States v. Santelises,* 476 F.2d 787, 790 (2d Cir. 1973); *see also United States v. Yearwood,* 863 F.2d 6, 8 (4th 1988); *Fruchtman v. Kenton,* 531 F.2d 946, 948-49 (9th Cir.), *cert. denied,* 429 U.S. 895 (1976). Similarly, whether a federal sentence runs concurrently or consecutively to a state sentence is not a direct consequence of a guilty plea and therefore need not be explained to a defendant for a plea to be constitutionally valid. *United States v. Ray,* 828 F.2d 399, 418 (7th Cir. 1987), *cert. denied,* 108 S.Ct. 1233 (1988); *United States v. Degand,* 614 F.2d 176, 177 (8th Cir. 1980). Moreover, because a federal court has no control over any enhancement of a defendant's sentence by a state court, the court is not required to inform the defendant of such a possibility prior to accepting a plea of guilty. *Torrey v. Estelle,* 842 F.2d 234, 236 (9th Cir. 1988); *United States vs. Garrett,* 680 F.2d 64, 66 (9th Cir. 1982). Other collateral consequences include parole eligibility or revocation, *see, e.g., Holmes v. United States,* 876 F.2d 1545, 1549 (11th Cir. 1989); *Brown v. Perini,* 718 F.2d 784, 788 (6th Cir. 1983); *Sanchez v. United States,* 572 F.2d 210, 211 (9th Cir. 1977); the likelihood of an undesirable military discharge, *Redwine v. Zuckert,* 317 F.2d 336, 338 (D.C.Cir. 1963); and the potential for civil commitment proceedings, *George v. Black,* 732 F.2d 108, 111 (8th Cir. 1984).

The Court of Appeals for the Ninth Circuit has held that a court need not inform a defendant that his guilty plea would probably have the collateral consequence of estopping him from denying that his tax return was false and fraudulent in subsequent civil litigation. *United States v. King,* 618 F.2d 550, 552 (9th Cir. 1980). The court noted that civil tax liability does not follow directly from a guilty plea to a charge of filing a false and fraudulent tax return. Rather, like deportation proceedings, the government must first bring a separate action. So, too, the

government must prove the existence and amount of a tax deficiency before a defendant can be found civilly liable.

This court, in *United States v. Persico*, 774 F.2d 30, 33 (2d Cir. 1985), *cert. denied*, 108 S.Ct. 1995 (1988), held that a defendant is not entitled to be advised at the time of his guilty plea that his culpable activity could be used against him to support a subsequent RICO prosecution.

In *Torrey v. Estelle*, the Ninth Circuit noted:

> The distinction between a direct and collateral consequence of a plea "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984) (quoting *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005, 94 S.Ct. 362, 38 L.Ed.2d 241 (1973)).

842 F.2d at 236.

Applying this standard, civil forfeiture is not a direct consequence of a guilty plea because it does not represent "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* Parker's criminal conviction was neither a necessary nor a sufficient condition precedent to forfeiture of the currency.[7] Parker's guilty plea did not cause the currency to be forfeited. Under the relation-back doctrine,

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[7]The Second Circuit has recently suggested that factual admissions made during a plea proceeding may be used to establish probable cause to bring a forfeiture proceeding. *United States v. The Premises and Real Property at 4492 Livonia Road*, 889 F.2d 1258, 1268 (2d Cir. 1989). However, forfeiture is not an automatic consequence of a plea of guilty but rather can occur only after a separate proceeding in which the defendant is given the opportunity to present evidence that the property should not be forfeited. Here, the government did not rely on Parker's guilty plea to establish probable cause, but presented evidence sufficient to establish probable cause independently at the forfeiture trial.

the forfeiture occurs when the crime is committed and therefore, Parker had no property interest in the money as of that moment.[4] Indeed, even if Parker had never been charged with a crime or had been acquitted of all criminal wrongdoing, the government would have remained free to pursue forfeiture. "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." *Helvering v. Mitchell,* 303 U.S. 391, 397 (1938); *see also One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 235 (1972); *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 361 (1984).

The reason that an aquittal does not bar a forfeiture action is twofold. First, forfeiture is a civil, remedial measure brought against the offending property rather than a criminal penalty against the person acquitted. *United States. v. $2500 in United States Currency,* 689 F.2d 10, 12-16 (2d Cir. 1982); *United States v. D.K.G. Appaloosas, Inc.,* 829 F.2d 532 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 1270 (1988). In an *in rem* forfeiture proceeding,

> [i]t is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The [in rem] forfeiture is no part of the punishment for the criminal offense.

Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931).

Second, even if the government is unable to prove a criminal charge against a defendant "beyond a reasonable doubt," there may be sufficient evidence to support a civil forfeiture. In a civil forfeiture proceeding under 21 U.S.C. § 881(a)(6), the government has the burden of proving only that there is probable cause

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[4] "'All right, title, and interest in [property subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881 (h) (Supp. V 1987).

for belief that a substantial connection exists between the money to be forfeited and the exchange of a controlled substance. *United States v. Banco Cafetero Panama,* 797 F.2d 1154, 1160 (2d Cir. 1986); *United States v. $2500,* 689 F.2d at 16 (2d Cir. 1982); *see United States v. The Premises and Real Property at 4492 Livonia Road,* 889 F.2d 1258, 1269 (2d Cir. 1989); *Application of Kingsley,* 614 F. Supp. 219, 224 (D. Mass. 1985). Once probable cause is established, the burden shifts to the claimant to demonstrate that the money was not used in violation of the statute. *Banco Cafetero,* 797 F.2d at 1160; *United States v. Fifty Thousand Dollars ($50,000) U.S. Currency,* 757 F.2d 103, 105 (6th Cir. 1985).

Therefore, even if Parker had chosen not to plead guilty and had been acquitted after trial, the money could still have been the subject of a forfeiture action.

2. *Delay*

The forfeiture action in this case was brought almost four years after Parker's arrest, almost three years after his guilty plea, and one year after the New York Court of Appeals denied leave to appeal. Parker argues that this delay was unreasonable and that "the reason was to obtain an uninformed plea that substantially prejudiced Parker's rights that he asserted." Appellant's Brief at 34. He claims that he asserted his rights at the first opportunity, but has yet to receive a full and fair hearing. The government states that for much of the period between the criminal proceedings against Parker and the forfeiture, the Oneida County prosecutors were pursuing criminal charges involving Parker and a number of co-defendants and that contemporaneous civil proceedings might have forced the government to reveal sensitive information about the criminal prosecutions.

Whether a delay in bringing forfeiture proceedings was reasonable depends on the following factors: 1) length of delay, 2) reason for delay, 3) timing of claimant's assertion of his rights, and 4) prejudice to the claimant. *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850),* 461 U.S. 555, 564 (1983) (citing *Barker v. Wingo,* 407 U.S. 514 (1972).

We find that although the delay was lengthy, it was reasonable because the government has offered a valid explanation for it and the delay did not prejudice Parker's forfeiture defense. *See United States v. U.S. Treasury Bills Totaling $160,916.25 and U.S. Currency Totaling $2,378.75,* 750 F.2d 900, 902 (11th Cir. 1985) (fourteen month delay between discovery of money and initiation of forfeiture proceedings not unreasonable because of government's "diligent pursuit" of a pending criminal proceeding); *United States v. $18,505.10,* 739 F.2d 354, 356 (8th Cir. 1984) (delay of twenty-six months justified because property was being held as evidence for a state criminal proceeding and no prejudice resulted from delay). Moreover, there is no indication that Parker asserted a claim to the money held by the government prior to the initiation of the forfeiture proceedings.

3. *Destruction*

Parker asserts that he has been prejudiced because the currency was "destroyed" when it was replaced with a cashier's check, thereby depriving him of the opportunity to inspect the actual currency, notes, papers and receipts to prove that the money came from legitimate sources, such as gifts and profits from a restaurant he owned.

In *Arizona v. Youngblood,* 109 S.Ct. 333, 337 (1988) the Supreme Court held that unless a defendant can show bad faith on the part of the police, the destruction of potentially useful evidence is not a denial of due process. Parker has not offered evidence of bad faith. Moreover, an appropriate substitution of monies is permissible in a forfeiture action. *United States v. $57,480.05,* 722 F.2d 1457, 1459 (9th Cir. 1984).[9]

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[9]Parker cites *United States v. Ramey,* 490 F. Supp. 96 (E.D.Tenn. 1980), for the proposition that property subject to forfeiture may not be destroyed prior to the issuance of a court order. The court in *Ramey* was concerned about the destruction of chemicals which had been seized but not yet found forfeitable. Had the chemicals been destroyed, the claimant would have had nothing to recover had he prevailed. Here, had he prevailed, Parker would have received the money in check form.

B. *Full and Fair Hearing*

As indicated above, Parker contends that Judge McAvoy erred in holding that he was collaterally estopped from challenging the forfeiture on Fourth Amendment grounds.

Although not raised by the parties, it is clear that the preclusive effect of a state court judgment is governed by state law. 28 U.S.C. § 1738 (1982); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380-81 (1985); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 443 U.S. 1021 (1987). Under New York law, collateral estoppel applies when the issue as to which preclusion is sought is identical with the issue decided in the prior proceeding, the issue was necessarily decided in the prior proceeding, and the party against whom preclusion is presently sought had a full and fair opportunity to litigate the issue in the prior proceeding. *Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 N.Y.2d 11, 17, 436 N.E.2d 461, 463, 451 N.Y.S.2d 11, 13 (1982).

Parker claims that he was denied a full and fair opportunity to litigate his Fourth Amendment claim in state court because 1) the state court fact-finding hearing was inadequate, 2) the state court incorrectly applied the controlling legal standard, and 3) Raymond was not available to testify at the state court proceedings.

1. *Fact-finding*

Parker, citing *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), claims that he was entitled to an evidentiary hearing in the federal district court on his Fourth Amendment claim because the state judge's factual determination as to that claim was not fairly supported by the record, there was a substantial allegation of newly discovered evidence, and the state court did not afford him a full and fair fact-finding hearing.

Under *Townsend*, the federal district court would have been required to grant Parker an evidentiary hearing on his Fourth Amendment claim if, as Parker claims, the record failed to sup-

port the state court's factual determination that false statements made by the Police were immaterial to the finding of probable cause. However, the record indicates substantial evidence, apart from the false statements, to support the state court's finding of probable cause for both the eavesdropping and search warrants. *See* 116 A.D.2d at 178-86, 500 N.Y.S.2d at 576-81. The first eavesdropping warrant was issued on the basis of information from informants who, at the time, the Police had reason to believe were reliable. Although subsequent developments in the investigation cast doubt on the veracity of those informants, the extension of the eavesdropping warrant and the issuance of the search warrant were supported by numerous drug-related conversations intercepted through the wiretap and interpreted by a police officer with extensive experience in drug trafficking investigations.

Parker also claims that he should have been granted a federal hearing because of the failure of the state court to reopen the suppression hearing in light of "newly discovered evidence." However, Parker's allegations of "newly discovered evidence" are far from substantial. First, he offers no explanation for his failure to discover the evidence prior to the suppression hearing. Second, the evidence itself, even if admitted, does not undermine the state court's finding of probable cause. With regard to the Police photographs which Parker sought to introduce, even if the Police knew or should have known prior to the failed surveillance that there were multiple approaches to Parker's residence, that knowledge would not necessarily have led them to the conclusion that Raymond was lying about everything he told them. With regard to his claim that the Police included untrue statements in their affidavits about the availability of money for drug buys, the identity of certain individuals, and the interpretation of certain phone conversations, Parker offers no basis for his conclusory allegations that the Police were untruthful about these other matters. In sum, no federal hearing was warranted on the basis of the state court's failure to reopen the suppression hearing because of newly discovered evidence.

Parker complains that no state hearing was held as to the facts alleged in support of the application for the search war-

rant. However, he had the opportunity to contest those facts at the state court suppression hearing. He also charges that the state court should not have concluded that the phone conversations overheard pursuant to the eavesdropping warrant were sufficient to support a finding of probable cause to search, because the police officers who interpreted those conversations for the court had previously demonstrated a disregard for the truth. However, portions of transcripts of conversations in which Parker's involvement in drug sales was openly discussed were attached to the applications for the extension of the eavesdropping warrant and issuance of the search warrant, rendering interpretation by the Police unnecessary. 116 A.D.2d at 185, 500 N.Y.S.2d at 581. Moreover, the record supports the Appellate Division's finding that the interpretations of the taped conversations offered by the Police implicating Parker in drug trafficking were reasonable.

Accordingly, Parker was not entitled to a federal evidentiary hearing under *Townsend* because the state fact determination was fairly supported by the record, Parker's allegations of newly discovered evidence were not substantial, and there is no indication that the state court did not afford Parker a full and fair fact-finding hearing.

2. *Legal Standard*

Parker further contends that he was denied a full and fair hearing of his Fourth Amendment claim in state court because the Appellate Division's decision in his case improperly applied the test enunciated by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 155-6 (1978). In *Franks*, the court held that if a defendant makes a substantial preliminary showing that 1) the warrant affidavit includes a false statement, 2) the statement was made knowingly and intentionally or with reckless disregard for the truth, and 3) the allegedly false statement is necessary to a finding of probable cause, then the defendant is entitled to a suppression hearing. However, if, when the false material is omitted, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required, *Id.* at 171-72.

In *United States v. Ferguson,* 758 F.2d 843, 849 (2d Cir.), *cert. denied,* 474 U.S. 1032 (1985), this court, applying *Franks* to a wiretap application, held that although the warrant affidavit contained some possibly false allegations, no material facts were omitted and, if the tainted allegations were disregarded, there remained a "residue of independent and lawful information sufficient to support probable cause."

The Appellate Division in Parker's case held that the Police showed a "reckless disregard for the truth" when they failed to tell the judge of the results of their surveillance of Parker's residence.[10]. The court, citing *Franks,* stated:

> The validity of the warrant, however, is determined by whether the false statement is necessary to the finding of probable cause. Thus, the falsehood should be deleted and the truth inserted to determine whether the warrant was based on probable cause.
>
> If the truth is inserted here, probable cause would still be evidenced. The truth was that the surveillance could not confirm whether Raymond was at Parker's house on May 17. The police were unsure because Raymond could have used an alternate route. The truth casts doubt upon Raymond's information but it does not eliminate probable cause because it does not establish that Raymond was lying.

116 A.D.2d at 185, 500 N.Y.S.2d at 581 (citations omitted).

Parker argues that if the Appellate Division had simply deleted from the warrant application Raymond's unreliable claim that he had been dealing with Parker, probable cause would unquestionably be lacking. However, as this court has recognized, the reasoning in *Franks* extends to material omis-

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[10]The officer in charge of the investigation testified that surveillance of Parker's house had to be stopped because of the remoteness of the area and a sudden increase in local traffic. However, it was revealed at the suppression hearing that the surveillance had been in place at the time that Raymond claimed to have left Parker's house. 116 A.D.2d at 185, 500 N.Y.S.2d at 580-81.

sions as well. *See United States v. Levasseur*, 816 F.2d 37, 43 (2d Cir. 1987) ("[M]aterially misleading omissions as well as misrepresentations may be challenged by the defense.") Moreover, by inserting the information that was known to the police but wrongly omitted from the warrant application because it might have cast doubt upon the existence of probable cause, the Appellate Division went further than Parker contends was necessary; had they merely omitted the false information without inserting the truth about the surveillance, the evidence supporting the finding of probable cause would have been even stronger. Accordingly, we hold that the court carefully applied the "correct and controlling constitutional standard" in rejecting Parker's Fourth Amendment claim and appellant is collaterally estopped from raising the issue in the federal court. *LaRocca v. Gold*, 662 F.2d 144, 148 (2d Cir. 1981).

3. *Unavailability*

It remains to be decided whether Parker should have been permitted to depose Raymond. Judge McAvoy granted the government's motion for a protective order precluding Parker from taking Raymond's deposition on the grounds that Raymond's testimony would not be relevant because Parker's Fourth Amendment claim had been denied on collateral estoppel grounds. However, Parker alleges that the state court suppression hearing was not complete because Raymond was "unavailable" to testify. Through Raymond's proposed deposition, Parker sought to establish that the police lied to the judge who issued the eavesdropping warrant and that these lies involved material facts going to the issue of probable cause. If Raymond was legally unavailable to testify at the state court proceedings and his testimony would have undermined the state court's finding of probable cause, collateral estoppel would not apply.

In *Blonder-Tongue Laboratories, Inc. vs. University of Ill. Found.*, 402 U.S. 313, 333 (1971) the Supreme Court declared that the application of collateral estoppel could result in unfairness if "without fault of his own" a party against whom collateral estoppel is sought was deprived of "crucial" evidence or

witnesses in the prior action whose outcome is said to bar a subsequent action. It is necessary therefore to decide whether Parker was responsible for Raymond's failure to testify in the state court proceedings and whether Raymond's testimony was "crucial" to Parker's Fourth Amendment defense.

At the time of the state hearing, Parker's attorneys sought Raymond's testimony and were advised by Raymond and his attorney that Raymond, who was then under indictment, would invoke the Fifth Amendment right if called to testify. As it turned out, Parker never actually called Raymond to testify or indicated on the record that he believed Raymond's testimony was necessary. Parker's failure to call Raymond to testify precludes the relief he now seeks.[1] Raymond's affidavit stating that he had lied to the Police about his connection to Parker (A. at 65) was offered by Parker at the suppression hearing and admitted into evidence but there is no indication in the record of the state court proceedings that Parker ever intended to call Raymond as a witness. Moreover, the issue of Raymond's unavailability was not raised by Parker in his appeal of the suppression ruling to the Appellate Division. Finally, because the trial court and the Appellate Division did not consider the evidence supplied by Raymond to be material to the existence of probable cause, Raymond's testimony as to the truthfuness of that information was not "crucial" or even relevant.

Accordingly, the district court properly precluded Parker from deposing Raymond and correctly concluded that because he had a full and fair opportunity to litigate his Fourth Amendment claim in state court, Parker was not entitled to federal review of that claim.

The judgment of the district court granting forfeiture is affirmed.

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[1]Parker cites *People v. Comfort*, 542 N.Y.S.2d 84 (A.D. 4th Dep't), *appeal denied*, 74 N.Y.2d 807, 545 N.E.2d 879, 546 N.Y.S.2d 565 (1989) in support of his claim that "it was not necessary to go through the mechanical formalism of actually calling [Raymond] to the stand" in order to establish that he was unavailable. Of course, the state appellate court's decision in *Comfort* is not binding on this court. Further, in *Comfort*, the party who failed actually to call the witness was not the same party who later sought to establish that the witness was unavailable.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTIRCT OF NEW YORK

* * * * * * * * * * * * * * * * *

UNITED STATES OF AMERCA,

Plaintiff,

Civil Action No.
87-CV-634

v.

(McAvoy, T.J.)

$228,536.00 in United States Currency,

Defendant,

ORDER

* * * * * * * * * * * * * * * * *

Plaintiff having moved this Court for an Order striking the defense of the exclusionary rule set forth in the answer of the claimant and further seeking a protective order precluding the taking of the deposition of one non-party witness, Walter Raymond, and after reading plaintiff's Notice of Motion and supporting Affidavit, together with the plaintiff's original memorandum of law and supplemental memorandum of law, and after reading the response of the claimant, and after hearing John J. Brunetti, Assitant United States Attorney, attorney for plaintiff and Frank Policelli, Esq., attornay for claimant at a motion term of this Court in Binghamton, New York on December 23, 1987, and having issued a decision from the bench with respect to both motions, it is hereby

ORDERED that the claimant's defense set forth in his answer that the subject matter of the forfeiture was obtained in violation of the Constitution of the United States is hereby dismissed and stricken, and it is further

ORDERED that the claimant is precluded from taking the deposition of Walter Raymond in light of the Court's decision on the motion to dismiss claimant's defense.

Dated: December 24, 1987
Binghamton, New York

HON. THOMAS J. MC AVOY
UNITED STATES DISTRICT
COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

$228,536.00

MEMORANDUM — DECISION — ORDER

The issues in this forfeiture action were tried before the Court without a jury in Syracuse, New York on the 27th, 28th and 29th days of March, 1989.

The claims that were litigated arise out of the seizure, pursuant to search warrant, of $228,536.53 in cash which was recovered on or near premises owned by the claimant Edward A. Parker.

In order to be successful in the action, the government first had to establish that it had probable cause to remove the money from the Parker premises. Probable cause was established to the Court's satisfaction and the burden of proof then switched to the claimant Parker to prove by a fair preponderance of the evidence that the cash was not the proceeds of drug related activity.

At the trial claimant Edward A. Parker, who is currently doing twenty years to life in a New York State penitentiary for his conviction for the drug related activity, testified on his own behalf as to his claim of ownership of the cash involved. In order to demonstrate ownership of the money claimant offered evidence of his income earning ability. He testified that he had graduated from college with an undergraduate degree and a masters' degree. Following his academic pursuits he had an unsuccessful marriage and began earning funds by working for his father selling paint and tile and also working actively in the installation of tile and other floor covering material.

Although claimant was very unclear as to the dates of any specific events in his life, he testified that he eventually purchased a home in the Remsen, N.Y. area and also a business known as the White Birch Inn Restaurant which is also located near Remsen. No testimony was offered by claimant regarding the source of the funds used to acquire the restaurant or the equity in the home in Remsen.

While living in the Remsen area prior to his arrest and conviction in the early 1980s the government established by clear and convincing evidence that claimant Parker was a major cocaine dealer. Testimony given by means of tape recordings of the claimant and his live-in girl friend Mary Lou Entwistle (later to become Mrs. Edward Parker) of acquisition of cocaine from Florida and distribution of same to various dealers in the Utica and Remsen, N.Y. areas. In addition to the evidence of the conversations contained in the tapes, eyetwitness testimony to the acquisition, possession, distribution and sale of cocaine was given by Gerald Palamar who actually lived at claimant's home for approximately nine months during 1982. Mr. Palamar tes-

tified that he saw claimant receive, process, distribute drugs and obtain cash in that connection. He testified that the drugs were in large quantities and the payments were in large sums of cash.

As a result of information from the wiretaps which resulted in the recordings and other sources, New York State Police obtained and executed search warrants at the Parker residence in Remsen, N.Y. on August 30, 1983. During the search of the premises the currency which is the subject of the forfeiture proceeding was located and taken to police headquarters.

Buried under leaves and branches in a brown plastic garbage bag in the vicinity of the Parker horse barn, was the sum of $19,790.00. Also similarly concealed in proximity to that amount of cash were eleven kilos of nearly pure cocaine, also hidden in brown plastic garbage bags. In addition, the police located during the search the sum of $8,547.94 in a brown brief case and $198.59 in a small blue bag both from the master bedroom of the Parker residence.

The raid also disclosed that the Parker residence contained items frequently used by drug traffickers including mannitol (a cutting agent), scales and cocaine testing kits and other dealer paraphernalia.

Thereafter, the claimant Parker pled guilty to criminal possession of a controlled substance in the first degree and later commenced the action herein under consideration.

In order to support his claim to the monies recovered by the State Police, Parker indicated that while located in the Remsen vicinity he had income from various sources. Those sources included monies returned from the business of the White Birch Inn Restaurant and sales of items such as candles and firewood cut on the Remsen residential premises.

Contrary to claimant's assertions that he generated a substantial income, the government introduced income tax returns for the years 1981 and 1982 showing gross income of approximately $19,000.00 in each year. Because of that and a total failure to

show any other sources of income, the Court finds that the claimant was unable to establish that any income produced as a result of his own earning abilities were related to the funds recovered from the Parker residence.

The main thrust of claimant's proof of ownership of the funds was that he had inheritances from his uncle Max Parker and aunt Better Becker.

In that connection, with respect to funds given to him by Max Parker, he stated that in addition to various cash amounts received during the life of uncle Max Parker that he received approximately $100,000.00 from Max' estate in 1973. Parker was unable to state any of the dates upon which any of the cash gifts were made or any specific sums which were given to him by his uncle Max during his lifetime. As to the estate proceeds, claimant testified that he received the $100,000.00 in check form and either cashed the check or deposited it but did not say where it was deposited. He testified further that he saved an unspecified amount of that money and that he spent an unspecified amount of that money and some of that money was with the funds seized by the government in August of 1983. He was unable to state how much of the money received from his uncle Max was present with the money seized by the government in August of 1983. No records of any kind were offered to substantiate these claims.

With respect to his aunt Betty, he believed that she had willed him 8% of her estate but had absolutely no idea of how much money there was in the estate when Betty died. He did believe that he had been given $30,000.00 or $40,000.00 by Betty during her lifetime but couldn't say how much of that he spent, how much of it he saved or how much of it ended up with the monies ultimately seized by the government. Again, no records of any kind were offered in connection with the gifts from aunt Betty.

Claimant also testified that although he earned monies from his restaurant business, the sale of firewood and his employment in the construction industry, he was unable to specify or state how much of that income, if any, was at the residence at the time of the forfeiture.

FINDINGS OF FACT

The Court finds that claimant failed to establish any source of cash by income or gift or otherwise which was a part of the funds seized by the government.

Based on the evidence in the case the Court finds that claimant in 1981 and 1982 was a major dealer of controlled substances, that he purchased large amounts of cocaine from Florida and sold them from his home in Remsen, N.Y. to various individuals identified in the evidence; that he kept a record of his drug sales transactions, exhibits 55 and 56 in evidence, and as indicated by the government's witness Robert McIntyre, those records clearly indicated a pattern of sales of large amounts of cocaine up to and including pounds and kilograms for the then current value of cocaine from approximately $57,000.00 to $63,000.00 a kilogram.

The Court finds further that there was a pattern of drug dealing with residents of Oneida County and the Utica vicinity carried out at claimant's home; that through tape recordings of conversations made with claimant and others with buyers and sellers of cocaine it is established that buyers would call the house, request to be allowed to come there and that on various time they did in fact come and buy large quantities of cocaine. The Court finds that direct evidence in support of the conclusion that claimant was a large-scale cocaine dealer came from the witness Palamar who had lived at the claimant's residence for some nine months and who was employed as a manager at the White Birch Inn, claimant's place of business. As stated, Palamar actually saw large amounts of the drugs, was involved in cutting the drugs with mannitol purchased by the claimant for that use, helped count the money from the sales, saw the drug paraphernalia at the residence which was seized in the raid in August of 1983 and gave uncontradicted testimony that large sums of cash were received by claimant from the drug deals at his residence.

The government established that the substance seized from claimant's residence in August of 1983 was in fact cocaine, that

this money was secreted a short distance from a box containing $228,536.00 in cash and the court finds as a matter of fact that the money seized by the government totaling the amount of $228,536.53 was in fact the proceeds of the sale of cocaine by the claimant Edward Parker and that claimant has failed to meet his burden of proof by the preponderance of the evidence that any of the sums seized by the government were in fact monies obtained as a result of legitimate business interests.

CONCLUSIONS OF LAW

1) That the sums of money so seized were in fact furnished or intended to be furnished in exchange for a controlled substance purusant to 21 U.S.C. 881, and that in seizing the funds the government had reasonable grounds to believe that the property was subject to forfeiture. *See U.S. vs. Banco Cafetero*, 797 Fd 1160 (2d Cir. 1986) and *U.S. vs. $93,685.16 in United States Currency*, 730 F2d 571 (9th Cir.)

2) Plaintiff has failed to meet his burden that the monies forfeited were not drug related. *See U.S. vs. One 1968 Piper Navaso Twin Engine Aircraft*, 594 F2d 1040 (5th Cir.) and *U.S. vs. $4,255,000.*, 762 F2d 906.

3) The Court further concludes that the claimant's Fifth Amendment due process rights were not violated by the seizure nor the bringing and maintaining of the forfeiture proceeding, nor was the claimant subject to double jeopardy because of the maintenance of this action.

Dated at Binghamton, New York
May 2, 1989

Thomas J. McAvoy

THOMAS J. MC AVOY
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs. 87-CV-634

$228,536.00

MEMORANDUM — DECISION — ORDER
(corrected)

The issues in this forfeiture action were tried before the Court without a jury in Syracuse, New York on the 27th, 28th, and 29th days of March, 1989.

The claims that were litigated arise out of the seizure, pursuant to search warrant, of $228,536.53 in cash which was recovered on or near premises owned by the claimant Edward A. Parker.

In order to be successful in the action, the government first had to establish that it had probable cause to remove the money from the Parker premises. Probable cause was established to the Court's satisfaction and the burden of proof then switched to the claimant Parker to prove by a fair preponderance of the evidence that the cash was not the proceeds of drug related activity.

At the trial claimant Edward A. Parker, who is currently doing twenty years to life in a New York State penitentiary for his conviction for the drug related activity, testified on his own behalf as to his claim of ownership of the cash involved. In order to demonstrate ownership of the money claimant offered evidence of his income earning ability. He testified that he had graduated from college with an undergraduate degree and a masters' degree. Following his academic pursuits he had an unsuccessful marriage and began earning funds by working for his

father selling paint and tile and also working actively in the installation of tile and other floor covering material.

Although claimant was very unclear as to the dates of any specific events in his life, he testified that he eventually purchased a home in the Remsen, N.Y. area and also a business known as the White Birch Inn Restaurant which is also located near Remsen. No testimony was offered by claimant regarding the source of the funds used to acquire the restaurant or the equity in the home in Remsen.

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As a result of information from the wiretaps which resulted in the recordings and other sources, New York State Police obtained and executed search warrants at the Parker residence in Remsen, N.Y. on August 10, 1983. During the search of the premises the currency which is the subject of the forfeiture proceeding was located and taken to police headquarters.

Buried under leaves and branches in a brown plastic garbage bag in the vicinity of the Parker horse barn, was the sum of $219,790.00. Also similarly concealed in proximity to that amount of cash were eleven kilos of nearly pure cocaine, also hidden in brown plastic garbage bags. In addition, the police located during the search the sum of $8,547.94 in a brown brief

case and $198.59 in a small blue bag both from the master bedroom of the Parker residence.

The raid also disclosed that the Parker residence contained items frequently used by drug traffickers including mannitol (a cutting agent), scales and cocaine testing kits and other dealer paraphernalia.

Thereafter, the claimant Parker pled guilty to criminal possession of a controlled substance in the first degree and later commenced the action herein under consideration.

In order to support his claim to the monies recovered by the State Police, Parker indicated that while located im the Remsen vicinity he had income from various sources. Those sources included monies returned from the business of the White Birch Inn Restaurant and sales of items such as candles and firewood cut on the Remsen residential premises.

Contrary to claimant's assertions that he generated any substantial income, the government introduced income tax returns for the years 1981 and 1982 showing gross income of approximately $19,000.00 in each year. Because of that and a total failure to show any other sources of income, the Court finds that the claimant was unable to establish that any income produced as a result of his own earning abilities were related to the funds recovered from the Parker residence.

The main thrust of claimant's proof of ownership of the funds was that he had inheritances from his uncle Max Parker and aunt Betty Becker.

In that connection, with respect to funds given to him by Max Parker, he stated that in addition to various cash amounts received during the life of uncle Max Parker that he received approximately $100,000.00 from Max' estate in 1973. Parker was unable to state any of the dates upon which any of the cash gifts were made or any specific sums which were given to him by his uncle Max during his lifetime. As to the estate proceeds, claimant testified that he received the $100,000.00 in check form

and either cashed the check or deposited it but did not say where it was deposited. He testified further that he saved an unspecified amount of that money and that he spent an unspecified amount of that money and that some of that money was with the funds seized by the government in August of 1983. He was unable to state how much of the money received from his uncle Max was present with the money seized by the government in August of 1983. No records of any kind were offered to substantiate these claims.

With respect to his aunt Betty, he believed that she had willed him 8% of her estate but had absolutely no idea of how much money there was in the estate when Betty died. He did believe that he had been given $30,000.00 or $40,000.00 by Betty during her lifetime but couldn't say how much of that he spent, how much of it he saved or how much of it ended up with the monies ultimately seized by the government. Again, no records of any kind were offered in connection with the gifts from aunt Betty.

Claimant also testified that although he earned monies from his restaurant business, the sale of firewood and his employment in the construction industry, he was unable to specify or state how much of that income, if any, was at the residence at the time of the forfeiture.

FINDINGS OF FACT

The Court finds that claimant failed to establish any source of cash by income or gift or otherwise which was a part of the funds seized by the government.

Based on the evidence in the case the Court finds that claimant in 1981 and 1982 was a major dealer of controlled substances, that he purchased large amounts of cocaine from Florida and sold them from his home in Remsen, N.Y. to various individuals identified in the evidence; that he kept a record of his drug sales transactions, exhibits 55 and 56 in evidence, and as indicated by the government's witness Robert McIntyre, those record clearly indicated a pattern of sales of large amounts

of cocaine up to and including pounds and kilograms for the then current value of cocaine from approximately $57,000.00 to $63,000.00 a kilogram.

The Court finds further that there was a pattern of drug dealing with residents of Oneida County and the Utica vicinity carried out at claimant's home; that through tape recordings of conversations made with claimant and others with buyers and sellers of cocaine it is established that buyers would call the house, request to be allowed to come there and that on various times they did in fact come and buy large quantities of cocaine. The Court finds that direct evidence in support of the conclusion that claimant was a large-scale cocaine dealer came from the witness Palamar who had lived at the claimant's residence for some nine months and who was employed as a manager at the White Birch Inn, claimant's place of business. As stated, Palamar actually saw large amounts of the drugs, was involved in cutting the drugs with mannitol purchased by the claimant for that use, helped count the money from the sales, saw the drug paraphernalia at the residence which was seized in the raid in August of 1983 and gave uncontradicted testimony that large sums of cash were received by claimant from the drug deals at his residence.

The government established that the substance seized from claimant's residence in August of 1983 was in fact cocaine, that this money was secreted a short distance from a box containing $228,536.53 in cash and the court finds as a matter of fact that the money seized by the government totaling the amount of $228,536.53 was in fact the proceeds from the sale of cocaine by the claimant Edward Parker and that claimant has failed to meet his burden of proof by the preponderance of the evidence that any of the sums seized by the government were in fact monies obtained as a result of legitimate business interests.

CONCLUSIONS OF LAW

1) That the sums of money so seized were in fact furnished or intended to be furnished in exchange for a controlled substance

pursuant to 21 U.S.C. 881, and that in seizing the funds the government had reasonable grounds to believe that the property was subject to forfeiture. *See U.S. vs. Banco Cafetero,* 797 Fd 1160 (2d Cir. 1986) and *U.S. vs. $93,685.16 in United States Currency,* 730 F2d 571 (9th Cir.).

2) Plaintiff has failed to meet his burden that the monies forfeited were not drug related. *See U.S. vs. One 1968 Piper Navaso Twin Engine Aircraft,* 594 F2d 1040 (5th Cir.) and *U.S. vs. $4,255,000.*, 762 F2d 906.

3) The Court further concludes that the claimant's Fifth Amendment due process rights were not violated by the seizure nor the bringing and maintaining of the forfeiture proceeding, nor was the claimant subject to double jeopardy because of the maintenance of this action.

Dated at Binghamton, New York
May 5, 1989

THOMAS J. MC AVOY
DISTRICT COURT JUDGE

C-1

UNITED STATES OF AMERICA, 89-6001

Plaintiff-Appellee

— *vs* —

UNITED STATES CURRENCY, IN THE AMOUNT OF $228,536.00,

Defendant

EDWARD A. PARKER,

Claimant-Appellant.

MOTION BY:
FRANK POLICELLI, ESQ.
1006 Park Avenue
Utica, New York 13501
(315) 793-0020

Has consent of opposing counsel:		
A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired?	☒ Yes	☐ No
(Substantive motions only)		
Requested return date: April 9, 1990		
(See Second Circuit Rule 27(b))		
Has argument date of appeal been set:		
A. by scheduling order?	☒ Yes	☐ No
B. by firm date of argument notice?	☒ Yes	☐ No
C. If Yes, enter date: October 20, 1989		

Judge or agency whose order is being appealed:

NOTICE OF MOTION

STAY OF ISSUANCE OF MANDATE

OPPOSING COUNSEL:
JOHN DUNCAN
369 Federal Building
100 S. Clinton Street
Syracuse, New York 13260
(315) 423-5165

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: Motion for Stay of Issuance of Mandate pending Writ of Certiorari to Supreme Court

Will the parties agree to maintain the status quo until the motion is heard? ☒ Yes ☐ No

Federal District Court Judge for the Northern District of New York, Hon. Thomas J. McAvoy

Brief statement of the relief requested: Stay of Mandate pending application to the United States Supreme Court for a Writ of Certiorari

By:

S/N

FRANK POLICELLI, ESQ.

Appearing for: EDWARD A. PARKER

Date: April 5, 1990

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

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IT IS HEREBY ORDERED that the motion be and it hereby is granted.

S/N S/N 4/16/90
THOMAS J. MESKILL USCJ

S/N 4/16/90
RALPH K. WINTER USCJ (by TJM)

S/N 4/16/90
MORRIS E. LASKER U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of April, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— *vs* —

UNITED STATES CURRENCY, IN THE AMOUNT OF $228,536.00 89-6110

Defendant,

EDWARD A. PARKER,

Claimant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by claimant-appellant,

EDWARD A. PARKER

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

S/N

ELAINE B. GOLDSMITH
CLERK

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
JUDGMENT IN A CIVIL CASE

— *v* —

U.S. CURRENCY IN THE AMOUNT OF $228,536.00
CASE NUMBER: 87-CV-634

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury ha rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Courty. The issues have been tried or head and decision has been rendered.

IT IS ORDERED AND ADJUDGED in accordance with Judge McAvoy's

Memorandum-Decision-Order dated May 2, 1989 and corrected
Memorandum-Decision-Order dated May 5, 1989

that the sums of money so seized were in fact furnished or intended to be furnished in exchange for a controlled substance pursuant to 21 U.S.C. 881, and that in seizing the funds the government had reasonable grounds to believe that the property was subject to forfeiture. *See U.S. vs Banco Cafetero,* 797 Fd 1160 (2d Cir. 1986) and *U./S. vs $93,685.16 in United States Currency,* 730 F2d 571 (9th Cir.)

that plaintiff has failed to meet his burden that the monies forfeited were not drug related. *See U.S. vs One 1968 Piper*

Navaso Twin Engine Aircraft, 594 F2d 1040 (5th Cir.) and *U.S. vs $4,255.00*, 762 F2d 906.

that the Court further concludes that the claimant's Fifth Amendment due process rights were not violated by the seizure nor the bringing and maintaining of the forfeiture poroceeding, nor was the claimant subject to double jeopardy because of the maintenance of this action.

May 09, 1989
Date

J.R. Scully
Clerk

S/N
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

* * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,

Plaintiff,

— *v* —

$228,536.00 IN UNITED STATES CURRENCY,

Defendant.

* * * * * * * * * * * * * * * * *

ORDER OF FORFEITURE
Civil Action No.
87-CV-634

MC AVOY, J.

The above-entitled civil forfeiture action having come on for a non-jury trial before United States District Court Judge Thomas J. McAvoy on March 27, 28 and 29, 1989 at Syracuse, New York, and Assistant United States Attorney John G. Duncan, of counsel to Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, having appeared on behalf of the United States of America and Frank Policelli, Esq. and Kenneth Ray, Esq. having appeared on behalf of the claimant, Edward A. Parker,

NOW, upon evidence having been presented by the United States of America and claimant, Edward A. Parker, and after due deliberation herein the Court having rendered a Memorandum-Decision-Order dated May 2, 1989 which decision was corrected on May 5, 1989 and filed with the United States District Court on May 8, 1989, it is hereby

ORDERED, ADJUDGED AND DECREED, that the defendant currency ($228,536.00) be and the same hereby is forfeited to the Unites States of America for disposition in accordance with law, and it is further

ORDERED, ADJUDGED AND DECREED, that the corrected Memorandum-Decision-Order of United States District Court Judge Thomas J. McAvoy, dated May 5, 1989 and filed with the United States District Court Clerk's office on May 8, 1989 be amended to reflect the name of the Government's witness referred to in paragraph '2' of the Findings of Fact to read **Arthur Eberhart** instead of Robert McIntyre, and it is further

ORDERED, ADJUDGED AND DECREED that the Judgment in a Civil Case, dated May 9, 1989 and filed with the United States District Cout on May 9, 1989 be amended to reflect the word "claimant" instead of plaintiff in the paragraph '2' of said Judgment and also be amended to reflect that the defendant $228,536.00 in United States Currency is hereby forfeited to the United States of American for disposition in accordance with law.

Dated: May 19, 1989

S/N

HON. THOMAS J. MC AVOY
UNITED STATES DISTRICT
COURT JUDGE

as violation of Fourth Amendment Federal cases. 59 L Ed 2d 959.

When do facts shown as probable cause for a wiretap authorization become "stale". 68 ALR Fed 953.

What constitutes cmpliance by government agents with requirement of 18 USCS § 2518 (5) that wiretapping and electronic surveillance be conducted in such manner as to minimize unauthorized interception of communications. 54 ALR Fed 120.

Permissibie warrantless surveillance, under State communications interception statute, by State or local law enforcement officer or one acting in concert with officer. 27 ALR4th 449.

APPEARANCES OF COUNSEL

John Longeretta for **John Baris, appellant.**

Leslie R. Lewis for **Daniel Creaco, appellant.**

Frank E. Blando for **Mary Lou Entwistle, appellant.**

George F. Aney and *Dean L. Gordon* for **Salvatore A. Inserra, appellant.**

Frank Policelli and *Paul R. Shanahan* for **Edward A. Parker, appellant.**

Wiles, Fahey & Lunch and *Emil M. Rossi (Joseph Fahey* of counsel), for **Osvaldo ("Tony") Pardo, appellant.**

Barry M. Donalty, District Attorney (Michael Daley of counsel), for respondent.

OPINON OF THE COURT

SCHNEPP, J.

On these multidefendant appeals myriad related issues are raised concerning the existence of probable cause for eavesdropping and search warrants and compliance by the prosecution with various requirements of CPL article 700.

After the police uncovered an extensive cocaine trafficking conspiracy among the defendants, they were charged in six separate indictments with controlled substances related crimes. Edward A. Parker and Mary Lou Entwistle, who resided together in Oneida County, were charged with possessing large amounts of cocaine which they received from defendants Osvaldo A. Pardo who lived in Florida. The other defendants, John Baris, Daniel E. Creaco, Jr., and Salvatore A. Inserra also resided in Oneida County and participated in the operation by buying drugs from Parker and reselling them. On August 30, 1983 the State Police arrested Parker and seized from his home in rural Remsen, New York, approximately 26 pounds of cocaine with an estimated street value of $10 million. In addition to Parker the State Police also arrested his girlfriend Entwistle, and Baris, Creaco and Inserra. Pardo, who was arrested on August 31, 1983 on a Federal warrant, was arraigned on the State charges following his indictment by an Oneida County Grand Jury. The raid on Parker's residence was the culmination of a long investigation over a period of several months which involved undercover drug buys from persons suspected of dealing with Parker, the development of information from an informant and the extensive use of a wiretap on Parker's telephone. Following the denial of their motions to suppress evidence obtained pursuant to three eavesdropping and five search warrants issued between June 14 and September 1, 1983, the defendants pleaded as follows in satisfaction of these various indictments: Baris, Creaco and Entwistle to conspiracy in the second degree; Inserra to criminal possession of a controlled substance in the second degree; Parker to criminal possession of a controlled substance in the first degree; and Pardo to criminal sale of a controlled substance in the second degree and conspiracy in the second degree.

FACTS

In January 1983, the State Police commenced an investigation after they were apprised that the Utica City Police had obtained drug information regarding Parker. On or about April 6, 1983, undercover State Trooper Orlando D'Elia learned from a confidential informant, Joseph Santillo, that Parker was dealing in large quantities of cocaine. Santillo, who accurately identified other individuals as cocaine dealers and arranged for D'Elia to make drug purchases from these individuals, informed D'Elia that Parker dealt "approximately 20 kilos of cocaine a month" from his home in Remsen and that a year previously he was in Parker's house and witnessed the sale by Parker of one ounce out of a kilo of cocaine to Creaco. Santillo agreed to work with D'Elia in an attempt to infiltrate Parker's narcotics operation. Later in April D'Elia attempted to purchase cocaine from Creaco; however, after initially agreeing to sell the cocaine, Creaco refused to go through with the transaction because he had learned that D'Elia was "wired to the police". On April 26, 1983, Santillo introduced D'Elia to Walter Raymond who agreed to sell him cocaine. According to D'Elia, Raymond claimed that Parker was his direct supplier. Raymond sold cocaine to D'Elia on April 28, May 3 and May 17, 1983.

The State Police attempted to establish independently whether Raymond actually was dealing with Parker by arranging to purchase a large quantity of cocaine from him on May 17, 1983 at a bar near Parker's house and setting up a surveillance in the vicinity of the Parker residence in an effort to verify whether Raymond visited Parker's house.[1] D'Elia received a prearranged call from Raymond at 6:50 p.m. during which Raymond claimed he was calling from Parker's residence. At that time, the surveillance had been established near Parker's residence to verify that Raymond was there at the arranged time but the effort was terminated "due to the remoteness of the area, and a sudden increase in traffic" and it

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[1]The State Police also arranged to purchase drugs from Raymond and observe his movements on May 12, 1983; however, that plan proved unsuccessful because Raymond was otherwise occupied and had mechanical problems with his automobile.

was implied that the surveillance was discontinued before 6:30 p.m. It was later disclosed, however, that the surveillance was in place from 5:30 p.m. until approximately 7:40 p.m. during which time Raymond was not observed in the vicinity of the Parker residence.

On June 14, 1983, the Oneida County District Attorney applied under CPL 700.20 to Oneida County Court Judge Arthur A. Darrigrand for an eavesdropping warrant to authorize the tapping of Parker's home telephone. The affidavits in support of the application recited the information learned from Santillo and Raymond that Parker sold large quantities of cocaine from his house. State Police Investigator Michael Navin added information obtained from a pen register that Parker's phone had been used to place calls to the phones of individuals identified by the FBI as suspected drug dealers.[2] The court approved the application and issued a warrant on June 14 which provided for the interception of phone calls relating to the possession and sale of controlled substances and conspiracy related to those offenses. The warrant recited that normal investigative techniques would be unavailing, that the warrant should be executed so as to minimize the interception of communications unrelated to the charges and that if a pattern of communications related to unlawful narcotics activity could be established, then use of the wiretap should be restricted "to such established times". The warrant also provided that "if from such established pattern, continued seizures are not necessary for a period of time * * * authorization is given to discontinue such seizure" and that the warrant was otherwise effective for 30 days.

The wiretap was installed on June 16, 1983. Between June 16 and July 12, 1983, the State Police intercepted a number of conversations which they believed were related to drug trafficking and submitted transcripts of these conversations to Judge Darrigrand as part of the application on June 12, 1983 for an extension of the eavesdropping warrant. The most significant phone conversation occurred on June 24 between Parker and a party identified as Chris Openheimer of Homestead, Florida. The transcript of this conversation reveals that Openheimer asked

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[2]The pen register was installed on May 18, 1983 pursuant to a court order.

Parker whether he remembered "those kinds of plants that Jack and Jeff brought up to you." Parker indicated that he did and Openheimer said that friends of his "just found * * * 200 out in the woods." Openheimer offered to sell them for "forty a piece" but Parker replied that he was "pretty stocked up" and that his prices had dropped; he offerd to buy "10 at 25". Navin alleged that this "guarded" conversation was really about kilos of cocaine and he reported learning from identified law enforcement officials in Florida that Openheimer operated a botanical nursery which may have been a front for illegal activities.

Parker also had conversations with Creaco on June 22 and July 6, 1983 and with another person on June 21 referring to the sale of "yellow paint", which Navin interpreted as related to drug transactions.[1]

The formal application by the District Attorney for the extension of the eavesdropping warrant incorporated by reference to the original papers dated June 14, 1983 together with Navin's affidavit of July 12, 1983 with the attached transcripts. It appears from this application that the full extent of the drug activity involving Parker had not been determined and that Trooper D'Elia was continuing his efforts to arrange a direct buy from Parker through Raymond. On July 13, 1983 the court granted the requested extension for 30 days subject to "all provisions and restrictions as contained in the Original Eavesdropping Warrant dated June 14, 1983."

Between July 13 and August 12, 1983, the State Police intercepted a number of phone calls implicating all the defendants in drug trafficking. However, during the first week of August they also developed strong evidence that Raymond had been lying to them about dealing directly with Parker. At that time D'Elia was still trying to arrange a buy through Raymond and was with Raymond when he allegedly made a call to Parker's

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[1]In an affidavit dated August 12, 1983 prepared by Navin in support of a second extension of the warrant, he identified "yellow paint" as slang for Valium.

residence. When the call was not recorded on the wiretap the State Police realized Raymond had faked the call and that he was probably not dealing with Parker. The investigators also knew that neither the pen register nor the wiretap had uncovered a single phone call between Raymond and Parker.

On August 12, 1983, the District Attorney applied to Judge Darrigrand for a second 30-day extension of the eavesdropping warrant incorporating by reference the two previous warrants and the papers on which they were based and adding a new affidavit by Navin. He also sought to amend the warrant by removing Raymond's name and adding the names of Entwistle, Inserra, Creaco, Baris and one Nabil Bajjaly to the list of persons whose conversations were authorized to be seized, in addition to Parker.[4] Navin attached transcripts of nine conversations to his affidavit of August 12, 1983, including a series of five telephone calls on July 28 involving Entwistle, Baris, Inserra and others during which the participants talked openly about dealing in cocaine and revealed that a quantity of cocaine was buried on the Parker property. It appears that Parker was away on a fishing trip and that the calls concerned Entwistle's efforts to procure several ounces of cocaine for Baris without having to locate and dig up the drugs buried by Parker. Navin also included a transcript of an August 3, 1983 conversation between Creaco and Parker in which the two discussed deals for "smokeables", "yellow paint", "V" and a "Z" which Navin translated as references to marihuana, Valium and ounces of cocaine. On August 12, 1983, Judge Darrigrand granted an extension to "the original Eavesdropping Warrant, dated June 14, 1983" for an additional 30 days.

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[4]The original eavesdropping warrant referred to "Edward A. Parker and Walter F. Raymond and others acting in concert with Edward A. Parker." The seizure of conversations involving the other defendants was within the scope of the original warrant and extensions and the amendment to the warrant to include the names of Entwistle, Inserra, Creaco and Baris as persons who utilized the Parker telephone satisfied the requirements of CPL 700.65 (4).

On August 22, 1983, 10 days later, Navin and D'Elia applied to Judge Darrigrand for search warrants covering the residence and property of Parker and Entwistle in Remsen, the residence and property of Inserra and his girlfriend, Suzan Toksu, in Utica and the residences of Creaco in Rome and Baris in Utica. In support of the Parker warrant Navin realleged the information from Santillo and Raymond, including the allegations that Raymond was dealing with Parker. Navin also summarized for the court information obtained from "a second confidential source of known reliability", later identified by Navin as a wiretap. In his affidavit, Navin relied on information gathered by this "source" from June 17 through August 20, 1983 to support the warrant application. Included among the conversations relied on by Navin were the July 28 conversations involving Entwistle and the August 3 conversation between Parker and Creaco, transcripts of which had been submitted to Judge Darrigrand on August 12. Navin also referred to conversations of July 30 and August 1 between Entwistle and Parker concerning the buried cocaine, a conversation of August 11 between Parker and Pardo and subsequent conversations with persons, described by him as "associates" of Pardo concerning a shipment of cocaine from Florida to Parker; however, transcripts of these conversations were not submitted at any time to Judge Darrigrand. D'Elia's supporting affidavit dealt primarily with his drug purchases from Raymond and his efforts to arrange a direct buy from Parker through Raymond. His affidavit, dated August 15, 1983, also referred to his dealings with Raymond through July 6, 1983. On August 23, 1983, Navin appeared before Judge Darrigrand and gave sworn testimony in support of the search warrants. At this time, Navin revealed that he was relying on the wiretap as his primary source of information and that he had personally head and reviewed every taped conversation. In his testimony, Navin pieced together the information from the tapes with surveillance reports and information from other law enforcement agencies to support his conclusion that Parker was the leader of a major cocaine ring and that he was expecting a large shipment of cocaine from Florida within a matter of days.

Navin's affidavit in support of the Inserra warrants was based entirely on information obtained from the wiretap. Navin again

referred to the conversations of July 28, 1983 between Inserra and Entwistle and he also referred to conversations between Inserra and Parker which took place on August 11, 14, 15, and 17, 1983. His affidavit in support of the Creaco warrant referred to the telephone conversation on July 6 and August 3, 1983, to the information received from Santillo, and to the results of the physical surveillance during which Creaco was observed at the Parker residence. His affidavit in support of the Baris warrant also referred to the telephone conversations of July 28, 1983 and to additional telephone conversations involving Baris which took place on July 29 and August 4, 13, 18 and 19, 1983. Navin testified that he believed drugs would be found at the Inserra, Baris and Creaco residences because of a general pattern detected from the phone conversations which indicated that they never allowed themselves to run totally out of drugs. After hearing Navin's testimony, Judge Darrigrand issued the search warrants.

From August 22 until August 30, 1983, the State Police continued to gather information about the conspiracy through the wiretap. They learned on August 27 that Parker had received the expected shipment of cocaine. The search warrants were executed on August 30, 1983. The raids uncovered the large quantities of cocaine at the Parker residence and smaller quantities of drugs at the other residences. Parker, Entwistle, Baris, Inserra, and Creaco were then arrested and arraigned on August 30 on the felony complaints charging criminal possession of a controlled substance in the first degree. Pardo was arraigned on Federal charges on September 2, 1983.

On August 30, 1983, the State Police turned off the wiretap; they disconnected the device the following day. Grand Jury indictments were returned against the defendants on September 29, 1983 and October 6, 1983. Parker and Entwistle were arraigned on their indictments on October 3, 1983 and October 18, 1983. Baris was also arraigned on October 18, 1983. Creaco was arraigned on October 31, 1983. Pardo was arraigned on October 3, 1983 and October 7, 1983. The arraignment dates for Inserra are not clearly indicated.

Each of the defendants was served when arraigned on the indictments with copies of the eavesdropping warrant and extensions and the applications for the warrants. The defendants subsequently moved to obtain the attachments to the warrant applications which had not been furnished upon their arraignment. These consisted of some photographs, a record of a conviction, records of toll calls and transcripts of the telephone conversations attached to the warrant applications. These items were turned over to defense counsel on December 21, 1984 approximately two months after the defendants were arraigned.

The defendants moved to suppress the evidence obtained pursuant to the eavesdropping warrants on the ground that the warrants were not based on probable cause. They also moved for suppression of the tapes on the basis of specifically described violations of CPL article 700. In addition, Parker, Entwistle, Baris, Inserra and Creaco moved to suppress the evidence obtained from the search warrants.

In a series of written decisions, Oneida County Court (Hurlbutt, J.), denied defendants' various motions following an extended suppression hearing which was expanded to include a hearing on the defendants' claim that false information was knowingly or recklessly furnished to the issuing Judge on the warrant applications. The court concluded that the warrants were based on an adequate showing of probable cause and that no violations of the requirements of CPL article 700 occurred. We agree.

The defendants contend that the eavesdropping and search warrants were not based on probable cause and are therefore invalid. They argue that the reliability of the confidential informant Santillo was not established and that his information was stale. They contend further that the State Police supplied false and misleading information to the issuing Judge with regard to the drug dealer Raymond and their efforts through surveillance to confirm or refute Raymond's claims that he dealt directly with Parker. They also claim that all the intercepted communications and any evidence derived therefrom should be suppressed on the ground of one or more violations of the pro-

cedures required under CPL article 700. In particular, it is claimed that the State Police failed to show the failure of normal investigative techniques (CPL 700.15 [4]), that the District Attorney failed to turn over the warrants and warrant applications within 15 days of arraignment (CPL 700.70), and that the warrants failed to include appropriate language limiting their duration to the period necessary to achieve the objective (CPL 70.30 [7]; 700.40).

I

To obtain the eavesdropping warrants, the police used information from Joseph Santillo, whose reliability as a confidential informant was evidenced by allegations that he had given the police information leading to five drug buys from three individuals during April, May and June 1983. The fact that he provided accurate information in the past is an indicator of his reliability *(see, People v. Rodriguez,* 52 NY2d 483, 489). Further, to establish the basis of his knowledge of Parker's drug activity the police reported that Santillo stated that on one occasion, one year before the application, he actually went inside Parker's house and saw Parker sell Creaco a quantity of cocaine from a large supply that Parker had. As the defendants point out, the problem with this information is that it was stale. However, stale information may be revived and acted upon "as long as the practicalities dictate that '[p]robable cause existent in the past [may] continue'" *(People v Christoper,* 101 AD2d 504, 527, *revd on other grounds* 65 NY2d 417, quoting *United States v Brinklow,* 560 F2d 1003, 1005, *cert denied* 434 US 1047). The State Police updated Santillo's information through Raymond who provided them with information that Parker was continuing the drug dealing through May 1983.

Raymond's reliability at the time of the June and July eavesdropping warrant was established because he directly admitted

buying cocaine from Parker and these admissions against his penal interest evidence his credibility *(see, People v Wright,* 37 NY2d 88, 90-91; *People v Simon,* 107 AD2d 196, 198-199). Moreover, the basis for Raymond's information was his own personal knowledge, as he described to D'Elia his various transactions and interactions with Parker. The apparent reliability of his statements was established by Santillo's information and by other corroborative information observed or collected by the State Police. Raymond's apparently reliable claim that he had purchased drugs from Parker on May 17, 1983, only four weeks before the original warrant application was made, justified the finding of probable cause at that time.

Neither the original eavesdropping warrant for the July extension were invalid because the police alleged that Raymond was dealing directly with Parker when the police knew he should have known that he was not.

If a "false statement knowingly and intentionally, or with reckless disregard for the truth, [is] included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause", the court reviewing the warrant must "set to one side" the false statement and determine whether probable cause is evidenced without the falsehood *(Franks v Delaware,* 438 US 154, 155-156). Defendant must prove by a preponderance of the evidence that the false statement was intentionally and recklessly made and mere negligence by the police in checking facts or recording information will not suffice *(Franks v Delaware, supra,* pp 169-170).

On May 17, 1983, Raymond allegedly called the police from Parker's house after buying drugs from Parker. However, the surveillance team near Parker's house did not see Raymond leave Parker's house. Thus it appears the State Police had reason to suspect Raynmond's reliability. The next day, however, they realized from aerial surveillance that Raymond could have visited Parker's house via an alternate route they had not known about and had not surveilled. Therefore, the truth was the the police could not be certain whether Raymond was at Parker's house. In the application, Navin averred that Ray-

mond was a reliable source of information and said that surveillance at Parker's house had to be stopped because of the remoteness of the area and a sudden increase in local traffic. While it is true that the surveillance eventually had to be terminated for that reason, it was developed at the suppression hearing that the surveillance was in place during the time Raymond supposedly left Parker's house. At the very least, the police, in our view, showed a reckless disregard for the truth and should have told Judge Darrigrand the results of their surveillance *(see, United States v Melvin*, 596 F2d 492, 499-500, *cert denied* 444 US 837).

The validity of the warrant, however, is determined by whether the false statement is necessary to the finding of probable cause *(Franks v Delaware*, 438 US 154, 155, *supra; see also, People v Plevy*, 52 NY2d 58, 66). Thus, the falsehood should be deleted and the truth inserted to determine whether the warrant was based on probable cause *(see United States v Ippolito*, 774 F2d 1482, 1484-1486; *compare, United States v Ferguson*, 758 F2d 843, 848, *cert denied sub nom. Baraldini v United States*, — US —, 106 S Ct 124).

If the truth is inserted here, probable cause would still be evidenced. The truth was that the surveillance could not confirm whether Raymond was at Parker's house on May 17. The police were unsure because Raymond could have used an alternate route. The truth casts doubt upon Raymond's information but it does not eliminate probable cause because it does not establish that Raymond was lying.

The defendants also contend that the first extension of the eavesdropping warrant obtained on July 13 was not based on probable cause because by that time the State Police should have realized that Raymond was lying and deleted him as a source of information. There is no evidence that the State Police knew Raymond was lying. Quite to the contrary, D'Elia was continuing his effort to arrange a buy from Parker through Raymond. In any event Raymond's information was by this time unnecessary to the finding of probable cause. In support of the application Navin attached transcripts of the conversation

between Chris Openheimer of Florida and Parker. Openheimer and Parker discussed the purchase of "200 plants" that Openheimer's friends had "found out in the woods". Navin, who detailed his extensive experience in drug enforcement, averred that this conversation was about kilos of cocaine. This appears to be a reasonable interpretation *(see, United States v Fury,* 554 F2d 522, 530-531, *cert denied* 436 US 931; *People v Manuli,* 104 AD2d 386). Probable cause for the first extension can be found solely on this "plant" conversation.

The defendants further claim that the last extension of the eavesdropping warrant on August 12 was unjustified. This extension, however, was clearly based on probable cause established by the results of the wiretap standing alone. Navin attached the transcripts of several calls made by Entwistle on July 28 wherein the parties openly discussed cocaine and Entwistle revealed that she and Parker, along with other defendants, were involved in selling drugs.

II

Defendants further claim that as a result of the alleged violations under CPL article 700 the tapes, together with the evidence obtined from the search warrants, which they claim were the fruits of the wiretap, should have been suppressed. We disagree.

Defendants argue initially that the applications for eavesdropping warrants were deficient because the People did not show that normal investigative proceedings had failed before applying for the eavesdropping warrants. Under CPL 700.15 (4), an eavesdropping warrant cannot issue unless the police show that "normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ". The case law establishes that eavesdropping warrants should not be used routinely as a first step in the investigation *(People v Gallina,* 95 AD2d 336). However, the police do not have to exhaust all possible steps before requesting an eavesdropping warrant and wiretapping does not have to be the last resort *(People v Carson,* 99 AD2d 664; *see, United States v Fury,* 554 F2d 422, 530,

n 7, *supra; People v Versace,* 73 AD2d 304, 307-308). The issuing court must be apprised of the nature, progress and difficulties in the investigation to insure that eavesdropping is more than just a "useful tool" *(People v Gallina, supra,* p 340; *People v Carson, supra; People v Versace, supra).* The court must test the People's showing in a practical and common-sense fashion in the context of the objectives of the investigation *(United States v Lilla,* 699 F2d 99, 103; *People v Rumpel,* 111 AD2d 481, 482).

Under these principles, the police made an adequate showing in their applications. The original warrant application alleged that the State Police repeatedly unsuccessfully tried through their informants to infiltrate Parker's conspiracy, make his acquaintance and observe his illicit operation first hand. In addition, the application described the efforts of the police to conduct a physical surveillance of Raymond and Parker. Related to this last allegation, the application alleged that direct surveillance of Parker's house was difficult to maintain because it was located in a remote area. Photographs attached to the affidavit demonstratred that his residence could not be seen from the road. Finally, the application explained that the police were using information from the FBI and DEA to develop leads in the case. In our view, this was a sufficient showing that "normal investigative procedures [had] been tried * * * failed" (CPL 700.15 [4]; *cf. People v. Viscomi,* 113 AD2d 76).

The first extension application also complied with CPL 700.15 (4). It alleged that Raymond was still refusing to introduce D'Elia to Parker. Morever, the application details extensive efforts made by the State Police to check various leads through the Florida Department of Law and other police agencies. On balance, the application complied with the statute because the police were still trying to infiltrate the conspiracy through Raymond.

This analysis also applies to the last extension. The application revealed that Raymond was still refusing to take D'Elia to Parker's house. This indicates that the police were still trying to make a direct buy from Parker, although by this time they suspected Raymond of lying to them. In any event, even if a

direct buy from Parker had been arranged, that would not have necessarily meant that their objective had been attained and that the police would have been invited into the conspiracy. Therefore, the wiretap was still necessary to uncover the full extent of the conspiracy.

III

The defendants' claim that the District Attorney did not give proper pretrial notice of the wiretaps and failed to furnish the entire warrant applications within 15 days of the arraignment has no merit.[1]

CPL 700.70 provides that: "The contents of any intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which interception was authorized or approved. This fifteen day period may be extended by the court upon good cause shown if it finds that defendant will not be prejudiced by the delay in receiving such papers."

We must first decide whether the 15-day period began to run upon the initial arraignment on the felony complaints or from the dates of defendants' arraignment on the indictments. Case law *(see, e.g., People v. Basilicato,* 64 NY2d 103; *People v. Mark,* 68 AD2d 315) and the legislative history of the section support the latter view.

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[1]Defendant Creaco does not raise any claim under CPL 700.70 in his own brief; however, he incorporates by reference the points of argument developed in the briefs of his codefendants. Defendant Pardo also claims that suppression is required under 18 USC § 2518 (9) because he was arrested initially on Federal charges; however, that section does not apply here because the wiretap orders were issued under CPL article 700 and no communications were intercepted pursuant to Federal wiretap provisions.

Prior to 1976, CPL 700.70 provided that the warrant and application only had to be turned over at least 10 days prior to trial. Pursuant to the Laws of 1976 (ch 194) this was changed to 15 days following arraignment. The purpose of the change was "to further effectuate the purpose of chapter 763 of the laws of 1974" which added CPL article 255 establishing the omnibus pretrial motion procedure (1976 NY Legis Ann, at 4). Pursuant to CPL 255.20 (1) "all pre-trial motions shall be served or filed within forty-five days after arraignment" or, in the case of motions to suppress eavesdropping evidence, within 45 days after the service of papers under CPL 700.70. Since the single omnibus motion contemplated by article 255 includes motions to dismiss an indictment (CPL 255.10 [1] [a]) it is obvious that the defendant's time does not begin to run until arraignment on the indictment, which date also then controls for purposes of defining arraignment under CPL 700.70.

In prior cases raising CPL 700.70 objections it has been held that unexcused noncompliance with the statute's commands requires suppression of the wiretap evidence *(People v Schulz*, 67 NY2d 144; *People v Basilicato, supra*, p 117; *People v Barnes*, 110 AD2d 1079; *People v Mark, supra)*. In our view, the cases at bar are distinguishable because the People within 15 days of arraignment on the indictments timely furnished defendants with the required warrants and applications, except for some attachments. Thus, unlike the prior cases which involved total noncompliance with the statute, there is presented here a situation where the People complied with the statute within 15 days of arraignment. Various attachments to the warrant applications were not turned over until defendants moved to obtain the attachments. The delay did not work any prejudice to the defendants and did not prevent them from moving to suppress the eavesdropping warrants as part of their pretrial omnibus motions for relief.

IV

Defendants also argue that the original warrant and extensions failed to require that the authorization "must terminate upon attainment of the authorized objective, or in any event in

thirty days'' (CPL 700.30 [7]; 700.40) and that the State Police continued to intercept communications under the second extension after the ''objective'' was achieved. Rather than simply copying the statutory language the District Attorney drafted his own version which, applied literally, conveys the impression that the wiretap could be terminated by the State Police and subsequently reactivated without further court authorization. However, this situation never arose and the wording sufficiently conveyed the idea that the warrant had to terminate upon achievement of the objective and could not operate more than 30 days and thus, fulfilled the statutory mandate.

Moreover, this provision from the original warrant was incorporated into the extensions. The first extension order explicitly incorporated by reference the original warrant. The second extension order issued expressly provided that it was an extension of the original eavesdropping warrant and in our view implicitly incorporated by reference all the provisions of original warrant not otherwise amended in the extension warrant.

In any event, the warrant was in fact terminated when the objective was achieved and within 30 days of the second extension and suppression was not required *(see, People v Palozzi,* 44 AD2d 224). *People v Mark* (68 AD2d 315, *supra)* does not compel a contrary result for there the search warrant was the objective of the wiretaps while here the State Police were concerned with uncovering a conspiracy and properly continued the phone taps until August 30 when the search warrant was executed and the conspirators arrested.

V

Based upon the information gathered throughout the investigation, including that obtained from Santillo and Raymond as well as the wiretap, the State Police applied on August 22, 1983 to Judge Darrigrand for the search warrants. The information relating to Raymond must be excised because the State Police misled Judge Darrigrand and omitted from the application and testimony in support of the warrants any hint that Raymond's information was unreliable *(Franks v Delaware,* 438 US

154, *supra*). The tip provided by Santillo was stale, therefore, the validity of the Parker and Inserra warrants depends on whether the untainted information from the wiretap, considered alone, establishes probable cause to support the warrants *(People v Arnau*, 58 NY2d 27, 33, n 1; *People v Plevy*, 52 NY2d 58, *supra)*.

In his affidavit supporting the application for the Parker search warrant and in his sworn testimony before Judge Darrigrand, Navin summarized more than 20 phone calls which he claimed provided reasonable cause to believe that Parker was the leader of an active drug ring and that cocaine and perhaps other drugs were stored on his property. Navin testified that he had personally viewed every conversation which had been intercepted. He stated in his affidavit that the conversations "have been interpreted by me, based on my being personally involved in talking to drug traffickers while working in an undercover capacity, investigating persons involved in the trafficking of controlled substances, and in particular, cocaine and heroine, and my past and present four and one-half years experience while assigned to the Troop D Major Crimes Unit" during which time he had "worked in an undercover capacity posing both as drug dealer and user, learning the habits, language and characteristics of controlled substance violators". Navin did not attach a single transcript to his affidavit nor is there any indication in the record that the court had or requested the opportunity to listen to the tapes. Instead of reviewing the direct evidence of criminal activity in the tapes, the court relied on Navin to draw reasonable inferences from the tapes and determined that probable cause existed on the basis of this filtered information.

"[C]ryptic and ambiguous conversations may serve as a predicate for probable cause when reasonably interpreted by an experienced investigator" *(People v Manuli,* 104 AD2d 386, 388, *supra)*. The court, however, cannot discharge its duty to determine whether the conversation has been "reasonably interpreted" without a transcript. Here, Navin's application for a search warrant came only after Judge Darrigrand had been actively involved in the investigation for two months. Navin's ap-

pearance before Judge Darrigrand on August 22 was his fourth since June 14 in connection with this case and Judge Darrigrand was obviously familiar with both Navin and the facts. On two prior occasions he had opportunities to review transcripts of intercepted conversations and compare them with Navin's interpretation. Navin's general reliability as an expert in narcotics cases had already been established. Moreover, on August 12, Navin had submitted to the court in connection with the applications for a second extension of the wiretap approximately 30 pages of transcript, including some of the telephone communications he subsequently relied upon to justify the search warrants. In particular, the court had before its transcripts of the July 28 calls involving Entwistle and several other defendants. In the course of these conversations, the participants related several times that Parker had buried drugs somewhere on his property. These conversations alone established the existence of probable cause to issue the Parker search warrant.*

For the same reasons, we conclude also that the Inserra search warrant was supported by probable cause. Although Navin failed to attach transcripts to his application for a warrant, he relied in his affidavit on an August 3 conversation between Parker and Inserra. The transcript of this conversation had been submitted to the court on August 13 in connection with the application for an extension of the eavesdropping warrant. Consequently, the failure to resubmit a transcript on August 22 must be deemed a harmless omission. Similarly, in support of the Baris warrant, Navin relied on the July 28, 1983 telephone conversation between Entwistle and Baris which had been submitted to the court. The record as a whole shows that probable cause existed to issue these search warrants.

Navin's affidavit, a part of the application for the Creaco search warrant, stated that Santillo told the police that on April 21, 1983 Creaco told him that he was selling cocaine from his

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*Defendants argued that the Parker search warrant was an invalid anticipatory search warrant; however, the evidence submitted to Judge Darrigrand indicated a substantial probability that the seizable property would be on the premises when searched, therefore, the warrant was valid *(People v Glen*, 30 NY2d 252, *cert denied sub nom. Baker v New York*, 409 US 849).

house. The affidavit also averred that D'Elia was present "when [Santillo] personally contacted Creaco at the Creaco residence located at 1812 Copperfield Street, Utica, New York, for the purpose of arranging a meeting between Creaco and D'Elia to transact a cocaine deal. That at that time and place, Creaco refused to deal cocaine with D'Elia, but advised [Santillo] that he would in fact deal cocaine with [Santillo]". At the suppression hearing D'Elia said this information was disclosed in a telephone conversation between Santillo and Creaco while he was present with Santillo. This information evidences probable cause because Santillo's reliability was established and he was reporting a direct conversation with Creaco. Although this information was four months old when the police applied for the search warrant, on balance, it was current enough to support probable cause because Creaco expressed a willingness to sell to Santillo and it can be reasonably inferred that Creaco was conducting this business over a period of time and was likely to continue *(see, United States v Kantz,* 504 F Supp 706, 709). Moreover, Navin's affidavit referred to the July 6, 1983 conversation between Creaco and Parker during which they discussed the sale of drugs. A transcript of this conversation had been submitted to Judge Darrigrand on July 12, 1983. Evidence linking Creaco to Parker, developed as the result of physical surveillance by the State Police, was also related in Navin's affidavit[1]. Probable cause was therefore established and suppression was not required.

The remaining issues raised by the defendants have been examined and are found to be without merit. We perceive no abuse of discretion in the sentences imposed on the defendants. The judgments should be affirmed.

CALLAHAN, J.P., DENMAN and BOOMER, J.J., concur.

Judgments unanimously affirmed.

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[1]Certain of the defendants requested a second *Franks* hearing *(Franks v Delaware,* 438 US 154) on their motions to suppress the search warrants; however, the suppression court deleted the information from Raymond without the necessity of an additional hearing and defendants failed to show any basis for a hearing with regard to the remaining information supplied by Navin and the requests for a hearing were properly denied.

Date: Jan. 13, 1987
Requesting Agency: New York State Police
Case Name: Edward A. Parker
Case Number: 83-897

FBI Adoptive Seizure
3010-87-F-001

U.S. Department of Justice
Application for Transfer of Federally Forfeited Property

To Be Completed by Requesting Agency Within 30 Days Following Seizure

1. **Requesting Agency or Agencies:**
   Agency Name: New York State Police, Troop D
   Agency Address: P.O. Box 30
   Oneida, NY 13421
   Contact Person/Title: Inv. Kent T. Cottet
   Telephone Number: (315) 363-4400

2. Description of Requested Property
   List and describe the property requested (include VIN or serial number, if known). If you are requesting an equitable share of the proceeds, in lieu of or in addition to other property, indicate the percentage you are requesting.
   $228,536.00 U.S. currency seized from Edward A. Parker

3. **Intended Law Enforcement Use:**
   Purchase of investigative equipment, purchase of evidence, purchase of information and vehicles for use in police in vestigations.

4. **Description of Requesting Agency's Participation in the Investigation:**
   Estimate your agency's contribution as a percentage of the total investigative effort. Where pertinent, indicate the percentage of manpower and/or money expended.

The Utica Police Department, through an informant, provided the original information to the New York State Police. Upon this information the New York State Police initiated and controlled the investigation. The New York State Police contributed seventy five percent of the total investigatory effort, including manpower and equipment. An informal agreement with the other participating agencies reflects a one-third division of the aforementioned proceeds to each agency upon final determination.

5. **Identification of All State or Local Law Enforcement Agencies That Participated in this Investigation:**
New York State Police
Utica Police Department
Oneida County District Attorney's Office

Date: January 13, 1987
Requesting Agency: New York State Police
Case Name: Edward A. Parker
Case Number: 83-897

6. **Description of Assets Seized for State Forfeiture in this Investigation, if any:**

Property	**Appraised Value**
None	

7. **Requester Agrees to Pay Fees and Expenses Necessary to Effect Transfer of Title Not Later Than the Time of the Transfer:**

Yes __x__ No _____

8. **Fiscal Officer to Whom Disbursement of Money Should Be Made:**
Name/Title: Superintendent of State Police
Address: Building 22, State Campus, Albany, New York 12226
Telephone Number: (518) 457-6137

9. **Official to Whom Transfer Documents Should be Delivered:**
   Name/Title: Superintendent of State Police
   Address: Building 22, State Campus, Albany, New York 12226
   Telehpone Number: (518) 457-6137

10. **Official to Whom Property Should be Delivered:**
    Name/Title: Superintendent of State Police
    Address: Builing 22, State Campus, Albany, New York 12226
    Telephone Number: (518) 457-6137

11. **Certifications:**
    A. The requester certifies that the above information is true and correct.

S/N — 1/29/87

Signature/Title — Date

THOMAS A. CONSTANTINE
Superintendent

B. As legal counsel for Superintendent of State Police I have reviewed this Application for Transfer of Federally Forfeited Property and I certify that Superintendent of State Police has the authority to accept the forfeited property and is the official to whom transfer documents should be delivered. It is my opinion that Superintendent of State Police is the proper fiscal officer to whom disbursement of money is to be made. I know of no state or local law prohibiting the transfer of this property to New York State Police.

S/N — 1/29/87

Signature/Title — Date

Jeffrey Chamberlain, Counsel

Address: Building 22, State Campus
Albany, New York 12226
Telephone Number: (518) 457-6137

Date: 12/29/86
Requesting Agency: Oneida Co. Dist. Attorney
Case Name: Edward A. Parker
Case Number: 83-897

FBI Adoptive Seizure
3010-87-F-001

U.S. Department of Justice
Application for Transfer of Federally Forfeited Property

To Be Completed by Requesting Agency Within 30 Days Following Seizure

1. **Requesting Agency or Agencies:**
   Agency Name: Oneida County Office of the District Attorney
   Agency Address: Courthouse and Elizabeth Street
   Utica, New York 13501
   Contact Person/Title: Mr. Barry M. Donalty, Oneida County District Attorney
   Telephone Number: (315) 798-5766

2. **Description of Requested Property:**
   List and describe the property requested (include VIN or serial number, if known). If you are requesting an equitable share of the proceeds, in lieu of or in addition to other property, indicate the percentage you are requesting.
   $228,536.00 U.S. currency seized from Edward A. Parker

3. **Intended Law Enforcement Use:**
   Future narcotic investiation including buy money, vehicle rent and lease lines for telephones.

4. **Description of Requesting Agency's Participation in the Investigation:**
   Estimate your agency's contribution as a percentage of the total investigative effort. Where pertinent, indicate the percentage of manpower and/or money expended.

Participation was the drafting and review of three eavesdropping warrants, seven search warrants and the supervision of the daily surveillances. Review of each of 77 days of intercepted telephone conversations, coordinating surveillance with drug deliveries or pick-ups. Estimated percentage of participation in overall investigation would be 33%.

5. **Identification of All State or Local Law Enforcement Agencies That Participated in this Investigation:**
New York State Police
Oneida County District Attorney's Office
Utica Police Department

Date:
Requesting Agency:
Case Name:
Case Number:

6. **Description of Assets Seized for State Forfeiture in this Investigation, if any:**

None

7. **Requestor Agrees to Pay Fees and Expenses Necessary to Effect Transfer of Title Not later Than the Time of the Transfer:**

Yes X No _____

8. **Fiscal Officer to Whom Disbursement of Money Should be Made:**
Name/Title: Barry M. Donalty, Oneida County District Attorney
Oneida County Courthouse, Utica, New York 13501
Telephone Number: (315) 798-5766

9. **Official to Whom Transfer Documents Should be Delivered:**
   Name/Title: Barry M. Donalty, Oneida County District Attorney
   Address: Oneida County Courthouse, Utica, New York 13501
   Telephone Number: (315) 798-5766

10. **Official to Whom Property Should be Delivered:**
   Name/Title: Barry M. Donalty, Oneida County District Attorney
   Address: Oneida County Courthouse, Utica, New York 13501
   Telephone Number: (315) 798-5766

11. **Certifications:**
   A. The requestor certifies that the above information is true and correct.

S/N — 12/22/86
Signature/Title — Date

B. As legal counsel for Oneida County District Attorney I have reviewed this Application for Transfer of Federally Forfeited Property and I certify that Barry M. Donalty, Oneida County District Attorney has the authority to accept the forfeited property and is the official to whom transfer documents should be delivered. It is my opinion that Barry M. Donalty is the proper fiscal officer to whom disbursement of money is to be made. I know of no state or local law prohibiting the transfer of this property to Oneida County District Attorney.

S/N — 12/22/86
Signature/Title — Date

Address: 800 Park Avenue
Utica, New York 13501
Telephone Number: (315) 798-5910

Date: January 13, 1987
Requesting Agency: Utica Police Department
Case Name: Edward A. Parker
Case Number:

FBI Adoptive Seizure
3010-87-F-001

U.S. Department of Justice
Application for Transfer of Federally Forfeited Property

To Be Completed by Requesting Agency Within 30 Days Following Seizure

1. **Requesting Agency or Agencies:**
   Agency Name: Utica Police Department
   Agency Address: 413 Oriskany St. West
   Utica, New York 13501
   Contact Person/Title:
   Telephone Number: ( )

2. **Description of Requested Property:**
   List and describe the property requested (include VIN or serial number, if known). If you are requesting an equitable share of proceeds, in lieu of or in addition to other property, indicate the percentage you are requesting.
   $228,536.00 seized from Edward A. Parker

3. **Intended Law Enforcement Use:**
   Future narcotics investigations, buy money, vehicle rentals and purchase of surveillance van, night vision surveillance equipment, and electronic surveillance and recording equipment.

4. **Description of Requesting Agency's Participation in the Investigation:**
   Estimate your agency's contribution as a percentage of the total investigative effort. Where pertinent, indicate the percentage of manpower and/or money expended.
   Our agency initiated the investigation, assisted in drafting of warrants, supplied all available manpower to man the electronic surveillance for 77 days intercepting telephone calls, interpreted conversations, participated in the surveillance of drug deliveries and pick-ups and provided manpower for raid parties. Estimated participation in the overall investigation would be 33% or greater.

5. **Identification of All State or Local Law Enforcement Agencies That Participated in this Investigation:**
   New York State Police
   Oneida County District Attorney's Office
   Utica Police Department

Date:
Requesting Agency:
Case Name:
Case Number:

6. **Description of Assets Seized for State Forfeiture in this Investigation, if any:**
   Property **Appraised Value**

7. **Requestor Agrees to Pay Fees and Expenses Necessary to Effect Transfer of Title Not Later Than the Tme of the Transfer:**

   Yes _____ No _____

8. **Fiscal Officer to Whom Disbursement of Money Should be Made:**
   Name/Title: Thomas J. Nelson, Comptroller
   Address: 1 Kennedy Plaza
   Name/Title:
   Telephone Number: (315) 792-0133

9. **Official to Whom Transfer Documents Should be Delivered:**
   Name/Title: Thomas J. Nelson, Comptroller
   Address: 1 Kennedy Plaza
   Utica, New York 13502
   Telephone NumberL (315) 792-0133

10. **Official to Whom Property Should be Delivered:**
    Name/Title: Thomas J. Nelson, Comptroller
    Address: Utica, New York 13502
    Telephone Number: (315) 792-0133

11 **Certifications:**

A. The requestor certifies that the above information is true and correct.

S/N	1/13/87
Signature/Title	Date

B. As legal counsel for City of Utica Police Dept. I have reviewed this Application for Transfer of Federally Forfeited Property and I certify that Thomas J. Nelson, Comptroller, has the authority to accept the forfeited property and is the official to whom transfer documents should be delivered. It is my opinion that Thomas J. Nelson is the proper fiscal officer to whom disbursement of money is to be made. I know of no state or local law prohibiting the transfer of this property to City of Utica Police Dept.

S/N	1/15/87
Signature/Title	Date

Address: 1 Kennedy Plaza
Utica, NY 13502
Telephone Number: (315) 792-0171

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

— v —

UNITED STATES CURRENCY, IN THE AMOUNT OF $228,536.00

Defendant.

AFFIDAVIT
Civ. Action No.
87-CV-634
JUDGE MC AVOY

STATE OF NEW YORK
COUNTY OF ONEIDA ss:

ANTONIO FAGA, ESQ., being duly sworn, deposes and says, as follows:

1. I am an attorney at law duly licensed to practice my profession in the Courts of the State of New York and the Northern District of New York.

2. Some time during the years 1983/1984 I was retained by one Walter F. Raymond, Jr., relative to his sale of controlled substances to an undercover police officer.

3. Pursuant to that representation, bail was set and Mr. Raymond was ultimately sentenced to a period of probation as a result of the crime that he had committed.

4. After my representation commenced, it became clear that Mr. Raymond provided information to the police officers which formed the basis for the search warrant and wiretap in a case entitled *People v. Edward Parker.*

5. Pursuant to that representation, I was contacted by both Paul Shananan, Esq. and Frank Policelli, Esq. as to Walter Raymond's availability to testify at a suppression hearing.

6. It was my opinion, and it still remains my opinion, that Mr. Raymond should not testify at that hearing while criminal charges were still pending against him.

7. Based upon that fact, I informed both Mr. Shanahan and Mr. Policelli that if Mr. Raymond were called to the witness stand in a suppression hearing, I would instruct him to invoke his constitutional privilege and he would plead the Fifth Amendment.

8. I have reviewed the affidavit of Assistant District Attorney, Michael E. Daly, and to the best of my knowledge, he never spoke with Walter Raymond and, he did not have control of Mr. Raymond to make him available for an interview or as a witness.

9. Walter Raymond was a defendant in a pending criminal action in the County of Oneida, and as such, he was not available in any manner as described by Mr. Daly.

S/N

Antonio Faga

Sworn to before me this
1st day of October, 1987.

S/N

Notary Public

CHERYL A. GEDDES
Notary Public State of New York
Appointed in Oneida County
My Commission Expires Aug. 4, 1988